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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1999

THE GOVERNMENT OF GUAM, ex rel.
THE GUAM ECONOMIC DEVELOPMENT AUTHORITY,
Petitioner,
v.
THE UNITED STATES OF AMERICA, THE DEPARTMENT OF DEFENSE, THE DEPARTMENT OF THE NAVY, THE DEPARTMENT OF THE AIR FORCE, THE DEPARTMENT OF THE INTERIOR, THE UNITED STATES FISH AND WILDLIFE SERVICE, and THE GENERAL SERVICES ADMINISTRATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 28(b) of the Guam Organic Act of August 1, 1950, requires the transfer of control to the Government of Guam of uplands, and tidelands, presently held by the United States but no longer needed for military purposes.

2. Whether, assuming Guam prevails on the First Claim of the Amended Complaint, Section 1(a) of the Territorial Submerged Lands Act of October 5, 1974, requires the transfer of title to the adjacent submerged lands to Guam.

3. Whether, alternatively, assuming unextinguished aboriginal title still attaches to the sum of these lands, control and possession of them must now be transferred to Guam.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

The Government of Guam, on the relation of the Guam Economic Development Authority, petitions the Court to grant a writ of certiorari to review, vacate, and ultimately reverse, the judgment entered by the United States Court of Appeals for the Ninth Circuit in this cause on June 4, 1999.

OPINIONS BELOW

The judgment of the court of appeals sought to be reviewed was entered on June 4, 1999, supported by an opinion published at 179 F.3d 630 and reprinted in the Appendix hereto. (App. B at 3a.) That judgment affirmed the decision of the District Court of Guam entered on July 16, 1997 [E.R. 97],[1] which had rejected the claims of the Government of Guam in a Memorandum Order unreported and reprinted herein. (App. E at 27a.)

JURISDICTION

Several objections to the jurisdiction of the district court to entertain the complaint were filed by the Federal parties [E.R. 10 and E.R. 19], but all were either overruled (App. E at 33a-38a), or were effectively abandoned on appeal. The jurisdiction of the district court rested, *inter alia*, on 28 U.S.C. §§ 1331, 1361, 2201 and 2409a. A judgment finally disposing of the entire case as to all parties having been entered on October 22, 1997 (App. C at 22a), after denial of Plaintiffs timely Motion for Reconsideration (*see* 28 U.S.C. § 2107, Fed. Rule of App. Proc. 4), the court of appeals had jurisdiction under 28 U.S.C. § 1291 to entertain the appeal initiated by notice filed October 24, 1997 [E.R. 139].

A timely petition for rehearing in the court of appeals was filed on July 16, 1999 and an order amending the opinion but denying rehearing was entered on August 12, 1999. (App. A at 1a.) The present Petition for Certiorari is therefore timely under this Court's Rules 13.1 and 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND EXECUTIVE ORDERS INVOLVED

Because some of the statutes and Executive Orders involved are relatively lengthy, they are set out in the Appendix hereto at 57a-68a. *See* Rule 14.1(f). Arranged in chronological order, the relevant texts are: (1) Executive Order No. 108-A, December 23,

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[1] "E.R." refers to Excerpts of Record filed by the Appellant (Petitioner here) in the court below, and "G.Exh" refers to the consecutively numbered exhibits, in four volumes, submitted by Guam in the district court (NR. 45-1, 46-1, 47-1, and 48-1).

1898; (2) the Guam Land Transfer Act of November 15, 1945, Pub. L. No. 225, 59 Stat. 584; (3) the Guam Land Acquisition Act of August 2, 1946, Pub. L. No. 594, 60 Stat. 803; (4) Section 28 of the Guam Organic Act of August 1, 1950, Pub. L. No. 630, 64 Stat. 392, as amended by Pub. L. No. 90-497 in 1968, codified at 48 U.S.C. § 1421f; (5) Section 33 of the Guam Organic Act of August 1, 1950, 64 Stat. 393, codified at 48 U.S.C. § 1421k; (6) Executive Order No. 10178, October 30, 1950, 15 F.R. 7313; and (7) Sections 1(a) and 1(b) of the Territorial Submerged Lands Act of October 5, 1974, Pub. L. No. 93-435, codified at 48 U.S.C. § 1705(a) and (b).

STATEMENT OF THE CASE

A. Factual and Statutory Background

At stake here are some 3,900 acres of upland and tidelands within the Territory of Guam, an island possession of the United States in the Western Pacific, together with some 15,000 acres of submerged lands, out to the three-mile limit, offshore. We note these acreages separately because insofar as size matters (*cf. Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 n.18 (1955)), it would be grossly deceptive to "count in" submerged lands when comparing the acreage claimed to the "size" of the island (214 square miles) or the total "land" in federal ownership at any given time ("44,800 acres" or "approximately 33 percent of the total land area of Guam," as of April 1995), which are usually stated in terms of dry land alone. *E.g.*, Robert M. Rogers, *Destiny's Landfall: A History of Guam* (Univ. of Hawaii Press 1995) 1 [G.Exh. 12]; 1994 Guam Land Use Plan ("GLUP 94") [G.Exh. 1].

1. Long before the "discovery" of Guam by Magellan in 1521, a substantial indigenous population lived on the island in permanent settlements, notably those located at the northern end of Guam, the area that concerns us here.[2] The native Chamorro were

[2] *See* Decl. of Robert M. Rogers at 4-6 [E.R. 70-71]; Paul Carano and Pedro C. Sanchez, *A Complete History of Guam* (Charles E. Tuttle Co. 1965) 20-22 [G.Exh. 14]; Fray Juan Pobre de Zamora, *The Account of the Loss of the Galleon San Felipe* (1598-1603), 18 J. Pac. Hist. 198, 213 (trans. by M. Driver, 1983)

organized into family clans, each asserting exclusive possessory rights over land, including offshore lagoons and reefs.[3] Although they earlier claimed Guam for the Crown, the Spanish at first made no attempt to colonize the island or interfere with the natives. Thompson, *supra*, 58. By the last third of the Seventeenth Century, however, this attitude changed, and despite indigenous rebellions during which much of the male population was slaughtered, the remaining Chamorro were subdued and forcibly "reduced" to a few settlements. Rogers Decl., *supra*, 5-7 [E.R. 70-71]; U.S. Navy, "Report on Guam, 1899-1950" (Dept. of Navy, Office of Chief of Naval Operations 1951) at 1-2 [G.Exh. 28]; Wyttenbach-Santos, *supra*, 2-3; Thompson, *supra*, 40, 58, 102, 294.

Without benefit of cession or purchase, most of the Chamorro properties were henceforth deemed "Crown Lands," albeit under prevailing Spanish law, the title of the natives remained unimpaired.[4] The lands in suit, at the northern end of the island,

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[G.Exh. 32]; F. Olive y Garcia, *The Mariana Islands, 1884-1887* (1887) (trans. by M. Driver, pub. By MARC 1984) 21-22 [G.Exh. 31].

We cite to these sources, rather than to the decision below, only because the district court and the court of appeals made few relevant findings for this period, preferring to "assume, without deciding, that the doctrine of aboriginal title [to which these facts are primarily relevant] applies to the natives of Guam." (App. B at 19a.)

[3] *See* Rogers Decl., *supra*, 7-8 [E.R. 71]; Laura S. Thompson, *Guam and Its People* (Princeton Univ. Press 1947) 100, 102-03 [G.Exh. 13]; Carano and Sanchez, *supra*, 21-22 [G.Exh. 14]; Lawrence J. Cunningham, *Ancient Chamorro Society* (The Bess Press, Honolulu, 1992) 162, 170-72 [G.Exh. 41]; Richard H.J. Wyttenbach-Santos, Ph.D., Captain, U.S. Navy (Retired), "An Historical Overview of the Military's Objectives on Guam and in Micronesia" (1994) at 1, 3 [G.Exh. 29]; Stanley K. Laughlin, Jr., *The Law of the United States and Affiliated Jurisdictions* (Lawyers Coop. 1995) 400; Rogers, *Destiny's Landfall, supra*, 74-75 [G.Exh. 12].

[4] *See* Response to Request for Admission Nos. 2 & 3 [E.R. 25-26]; Rogers Decl. at 7-9 [E.R. 75]; Carano and Sanchez, *supra*, 53, 58; Paul B. Souder, "Guam: Land Tenure in a Fortress," in *Land Tenure in the Pacific* (Univ. of South Pacific, Suva Fiji, 3d Ed. 1987) 212 [G.Exh. 15]; Thompson, *supra*, 102-03; *Laws of the Indies* (*Recopilacion de Leyes de Los Reinos de las Indias*), (1681), Book IV, Tit. 12, Laws 7, 9, 17, 18 (in American West Center (Tyler, ed.), Occasional Paper No. 17, *Spanish Laws Concerning Discoveries, Pacifications, and the Settlements Among the Indians* (Univ. of Utah 1980) 159, 160, 165-66 [G.Exh. 38]) and Book II, Tit. 31, Law 13; Book VI, Tit. 1, Law 23 (in American West Center (Tyler, ed.), Occasional Paper No. 16, *The Indian Cause in the Spanish Laws of the Indies* (Univ. of Utah 1980) 108, 114, 116-17 [G.Exh. 30]).

were never appropriated to any specific governmental use during the Spanish regime, and, at least in the Nineteenth Century, the natives were apparently not excluded from using them. Rogers Decl., *supra*, 9-10 [E.R. 77].

2. By the Treaty of Paris in 1898, at the close of the Spanish American War, Spain ceded Guam to the United States. Stipulated Fact No. 1 [E.R. 41]. Because of its special importance as a forward naval base, the President assigned the island to the Secretary of the Navy with full discretion "to take such steps as may be necessary to establish the authority of the United States and give it the necessary protection and Government." Exec. Order No. 108-A (Dec. 23, 1898) (App. F at 57a). For the ensuing half-century, Guam was administered as a military post, under the paternalistic, but absolute, control of a Naval Governor. Thompson, *supra*, 64-67, 297-98. Until World War II, however, the United States took no special interest in the northern end of the island, and while viewing all Spanish Crown lands as owned by the United States, did not interfere with native use of the lands in suit. Rogers Decl., *supra*, 10 [E.R. 77].

Guam was occupied by Japanese forces from December 1941 until mid-July 1944. Upon the recapture of the island, the United States "increased its military presence . . . [and] that increased presence required more land, which the United States continued to acquire until 1950." (App. B at 4a.) Accordingly, the American Armed Forces appropriated, initially without payment, much of the land on Guam, including all the acreage in suit except the Ritidian beach strip at the northernmost tip of the island.[5] In due course, formal condemnation proceedings were instituted to establish military reservations. Although the parcels here claimed as aboriginal lands were included in these reservations, no payment was made for them, the Federal Government's view being that these areas were already owned by the United States as Crown Lands ceded to it by Spain. Response to Request for Admission Nos. 6, 8, 9-13 [E.R. 27-32].

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[5] *See* Robert K. Coote, U.S. Bureau of Land Management, U.S. Dep't of Interior, *A Report on the Land-Use Conditions and Land Problems on Guam* (1950) at 2-3 [G.Exh. 17]; *Hearings on H.R. 6547, before the House Committee on Naval Affairs*, 79th Cong., 2d Sess. (May 29 and June 5, 1946) at 3448, 3460, 3469 [G.Exh. 54].

3. In 1945, the Navy sought and obtained from Congress ongoing authority to transfer lands not needed for military purposes to Guamanians. Guam Land Transfer Act of November 15, 1945 (App. G at 58a). The next year, Congress granted the Navy's request for formal authority to acquire additional land on Guam for naval purposes and, as something of an afterthought, for the resettlement program, too. Guam Land Acquisition Act of August 2, 1946 (App. H at 59a). In mid-1950, the Guam Organic Act was passed. (App. I at 60a.) By now, according to the court of appeals, "the military was no longer using much of that land; by 1950, more than 50 percent of the actual acreage in Guam was occupied by inactive military installations [citing a Congressional Report of 1950]." (App. B at 17a.) Noting that "Congress previously had enacted the Guam Land Transfer Act to allow for the release of some of this land," (App. B at 17a), the court went on to quote two further 1950 Reports indicating that "Congress expressed a similar purpose when drafting the Organic Act." (App. B at 17a.)

Among the provisions of the Organic Act was one (Section 28(b)) transferring all land not reserved by the President within ninety days to the new Guam Government established by the legislation. (App. I at 60a.) On the last day permitted, President Truman signed an Executive Order which, *inter alia*, reserved for military use all the land that had recently been condemned for that purpose. Exec. Order No. 10178, October 30, 1950, 15 F.R. 7313 (App. K at 63a). In 1958, the Air Force transferred to the Navy the northernmost slice of Andersen Northwest Field at the northern end of Guam, comprising some 184 acres. Stipulated Facts Nos. 17, 18 & 32 [E.R. 45, 50]. In 1962, the United States condemned for the Navy an adjoining strip of beach and tidelands of similar acreage. Stipulated Facts Nos. 33 & 34 [E.R. 50].

4. In 1974, Congress passed the Territorial Submerged Lands Act, 48 U.S.C. § 1705(a) *et seq.* (App. L at 66a), the evident purpose of which was to transfer to named territories some of the adjacent offshore water bottoms. Specifically exempted, however, are, *inter alia*, "all submerged lands adjacent to property owned by the United States above the line of mean high tide." § 1705(b)(ii) (App. L at 66a).

Guam claimed the seabed off the Ritidian Point parcel identified in its first claim, but could do so only contingently, i.e.

if it prevailed on that initial claim. Since that submission failed in both courts below, the Territorial Submerged Lands Act claim must await this Court's ruling on Claim One. In the meanwhile, however, we may and do preserve it.

5. In 1992, the Navy determined to close its Ritidian Facility (composed of the two strips of land described a moment ago), and formally declared these 371 acres, together with some 15,500 acres of adjacent submerged lands, excess to its needs. Stipulated Fact No. 48 [E.R. 52]. Although Guam sought this acreage (later identified as Guam's First and Second Claims), the General Services Administration transferred the uplands and tidelands to the United States Fish and Wildlife Service the following year. Stipulated Facts Nos. 49-51 [E.R. 52-53]. They then became the "Ritidian Unit" of the Guam National Wildlife Refuge, which was established primarily to protect endangered species of native birds. Stipulated Facts Nos. 91 & 92 [E.R. 61-63]. Unfortunately, the predation of the alien Brown Tree Snake, so far evading the best efforts of the Refuge guardians, has effectively eliminated these species. Dep. of Michael W. Ritter, 21:21-23:21, 25:11-19, 36:23-25, 51:17-25, 71:11-14 [E.R. 84-96]; Stipulated Facts Nos. 73-75 [E.R. 57-58].

In April 1995, after two years of intensive study and wide-ranging consultations at every level of the concerned military services, the Department of Defense published GLUP 94 [G.Exh. 1]. That report unequivocally concludes that substantial additional acreage now in Navy and Air Force reservations is no longer needed for military purposes and is accordingly "releasable." Guam's Third Claim seeks transfer of the Air Force lands identified as "releasable" in that report.

B. Procedural History

1. Guam initiated this suit in late 1995 against the United States and the several federal agencies holding the lands claimed. The Amended Complaint [E.R. 1] asserted a right to title or control of three categories of land, particularized in three separately stated claims: (1) some 371 acres of uplands and tidelands at the north tip of the island formerly constituting a United States Navy Communications Center, but declared

"excess" to Naval requirements in 1992, thereafter transferred to the U.S. Fish and Wildlife Service, and today constituting the Ritidian Unit of the Guam National Wildlife Refuge (First Claim); (2) approximately 15,571 acres of submerged lands and reefs adjoining the uplands just described, also declared excess by the Navy in 1992, and presently held for disposition by the General Services Administration (Second Claim);[6] and (3) some 3,553 acres of uplands held by the United States Air Force in northern Guam, which have been identified in GLUP 94 as "releasable" because no longer needed for Air Force purposes (Third Claim, as reduced during the proceedings below).[7]

By its Answer [E.R. 10] and Motion for Summary Judgment [E.R. 19], the Federal Defendants interposed a number of jurisdictional objections and also sought dismissal of the action on the merits. Guam filed its own Motion for Summary Judgment [E.R. 22], and the case was briefed and orally argued on the cross-motions in July 1996. A year later, the district court issued a Memorandum Order, granting summary judgment for the United States. (App. E at 27a.)

The court overruled the jurisdictional objections of the United States—albeit without discussing all of them—and turned to the merits. (App. E at 38a-39a.) Initially, however, the court declined to reach Guam's aboriginal title argument (Issue 3) on the ground that, if successful, it would not result in any specific relief. (App. E at 39a-40a.) The statutory claim was then rejected, the court holding that Section 28(b) of the Guam Organic Act was fully spent on October 30, 1950, when the President reserved the lands in suit, and has no continuing force. (App. E at 40a-55a.)

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[6] During the pendency of this proceeding, the U.S. Fish and Wildlife Service sought, and obtained from General Services Administration, a transfer of some of the submerged acreage formerly part of Guam's Second Claim.

[7] It may be helpful to note straightaway that the three Questions Presented and the three Claims for Relief presented here do not correspond. The Claims refer to lands in different federal custodial hands (the Fish and Wildlife Service, the General Services Administration or the Air Force); the Questions, on the other hand, are framed in terms of legal bases for recovery (Section 28(b) of the Guam Organic Act, Section 1(a) of the Territorial Submerged Lands Act, or unextinguished aboriginal title). The court of appeals is, of course, correct that Question 2 is moot if Question 1 is properly answered "No." (App. B at 19a.) Question 3, on the other hand, is only mooted (as potentially providing at best lesser included relief) if Question 1 is answered in the *affirmative*.

2. Guam moved for reconsideration [E.R. 129], asking the district court to consider and decide the aboriginal title claim, as well as the contention that there exists a fiduciary relationship between the United States and the native people of Guam. But, by a second Memorandum Order dated August 29, 1997 (App. D at 23a), the Motion was denied, the court adhering to the view that decision of these issues would "have no effect on the outcome of the case" and would constitute "mere dicta." (App. D at 24a, 26a.) A final judgment dismissing the suit was entered on October 22, 1997. (App. C at 22a.)

3. Guam's appeal was unsuccessful. The first Claim was disposed of on the merits. (App. B at 10a-19a.) The Territorial Submerged Lands Act claim was held mooted by the denial of the First Claim (App. B at 19a), while the aboriginal title claim (Third Claim) was rejected on the ground that the Territory of Guam lacked standing to advance it. (App. B at 20a.)

In sum, the court of appeals held that Section 28(b) of the Guam Organic Act is plain on its face and provides only for a "one-time grant of property." (App. B at 19a.) Thus, held the court, the lands in suit having been specifically reserved from transfer in 1950, they must be viewed as permanently withheld by the United States.

4. Rehearing was denied, albeit by an Order (App. A at 1a) amending the opinion in a minor respect. The judgment of affirmance previously entered remained undisturbed.

REASONS FOR GRANTING THE WRIT

This case has been a century in the making. It starts with our acquisition of the Island of Guam, together with the neighboring Philippines, in 1898, at the conclusion of the Spanish-American War, and with a decision by this Court a few years later resolving a dispute over aboriginal lands that the Federal government wished to use for its own purposes (*Cariño*). It will end (with or without an acknowledgment of kinship) at more or less the same time as other litigation (*Rice v. Cayetano*) in which the special status of other native American islanders is implicated.

I. The Decision Below Conflicts with Long-Settled Law Established by This Court

A. Direct Conflict with *Cariño*

The most immediate conflict is between the decision below and *Cariño v. Insular Government of the Philippine Islands*, 212 U.S. 449 (1909), a decision written for a unanimous Court by Justice Holmes.[8] The dispositive rulings of the court of appeals in the present case cannot be squared with *Cariño*. Moreover, although repeatedly invoked in both courts below by the Government of Guam, neither the district court nor the court of appeals so much as cited the case. There is no polite explanation: Unless the courts below are to be taxed with failing to understand an apparently obvious conflict that was pointed out to them, one must conclude that, disagreeing with *Cariño*, but lacking power to overrule the precedent, those courts chose simply to ignore it.

There are, of course, differences between *Cariño* and the present case (albeit not so many as the United States has at times asserted).[9] In the earlier litigation, a leading member of a native

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[8] Lest it be thought that "Homer nodded" in *Cariño*, it should be noted that Justice Holmes was especially happy with his opinion in the case. *See* 1 *Holmes-Pollock Letters* (Harv. Univ. Press 1941) 148, 152, 153; 2 *id.* at 27-28. *See also* 1 *Holmes-Laski Letters* (Harv. Univ. Press 1953) 6, 67.

[9] Thus, notwithstanding the representations of counsel for the United States at the oral argument before the district court (Tr.Or.Arg., July 26, 1996, NR. 65-1, at 44:20-22), it is not true that "plaintiff [in the *Cariño* case] was living on that land his entire lifetime. His ancestors had always lived on that land. They lived on it exclusively." The Philippines Supreme Court, whose factual summary was not disputed, stated that "[n]o one has lived on the land for many years. It was never used for anything but pasturage of animals, except insignificant portions thereof, and since the insurrection against Spain it has apparently not been used by petitioner for any purpose." *Cariño v. Insular Government*, 7 Phil.Rep. 132, 135 (1906). And in his own Brief in this Court it is expressly recited that "Mateo Cariño [the plaintiff] himself actually never lived upon the land, but up to 1903 occupied and used the said lands as pasturage lands for his cattle, constructing, in addition to the old fences maintained by his grandfather, other fences of wire." *Brief on Behalf of the Plaintiff in Error* in No. 72, O.T. 1908, at 3. Nor does this Court's Opinion assert anything more than that the plaintiff's "grandfather had lived upon [the land], and had maintained fences sufficient for the holding of cattle, according to the custom of the country . . . .; that the plaintiff's "father had cultivated parts and had used parts for pasturing cattle"; and that the plaintiff himself "had used it for pasture cattle in his turn." *Cariño*, 212 U.S. at 456.

tribe was seeking to establish his individual claim to particular lands (some 370 acres), both as a matter of aboriginal title and under the doctrine of lost grant or adverse possession.[10] There, unlike here, both the United States and the Territorial Government opposed the native claim. And, while in the earlier case the United States was invoking the Organic Act to sustain its title, here the corresponding Organic Act provisions are pleaded in support of the native claim. But these differences cannot obscure the controlling relevance to our case of both the result in *Cariño* and the underlying rationale of the decision.

1. The ultimate holding of *Cariño* was to sustain the native claim, notwithstanding the President's express reservation of the disputed land (or most of it) for a military hospital[11] under a

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Based on a half-truth at best is the further attempted distinction drawn between *Cariño* and the present case on the ground that in the earlier litigation "there was no Royal or Crown land at issue." Tr.Or.Arg., *supra*, at 45:7. Even though the point escapes us, it is well to set the record straight. As this Court's Opinion repeatedly notes, although Cariño himself asserted that his acreage had never been Crown land, the Federal stance in *Cariño* was that the land in dispute *was* Spanish Crown land which had passed to the United States by virtue of the Treaty of Paris, free of any native title cloud. *See* 212 U.S. at 457-58.

The United States did not repeat these statements on appeal. Instead, the precedent was sought to be avoided by a new representation, the misleading character of which will appear in a moment. In the Ninth Circuit, counsel for the United States asserted that (contrary to Guam's argument) "*Cariño* did not involve the canon governing ambiguities in statutes enacted for the benefit of native Americans, or, indeed, any statutory construction questions at all." No. 97-17140, C.A.9, *Brief for the Federal Appellees* at 29.

In this Court we expect to encounter no such false points.

[10] At least in this Court, *Cariño* was primarily claiming aboriginal title, independent of any reliance on a supposed "lost grant" or "acquisitive prescription." *See Brief on Behalf of the Plaintiff in Error, supra*, at 13-36; *Reply Brief* at 9-10.

[11] According to the opinion of the Supreme Court of the Philippine Islands which this Court reviewed, "[t]he Government of the United States also appeared and opposed the petition [for land registration] on the ground that the land was part of the military reservation of Baguio." 7 Phil.Rep. at 133. The *Brief for the United States and the Insular Government*, filed in this Court (No. 72, OT 1908, at 29) recites that "[o]n October 10, 1903, the Government of the United States, by proclamation of the President, set aside a military post and reservation which includes a large portion of the land in question, and has since been occupied by the army of the United States for the purposes specified." *See also, Brief on Behalf of the Plaintiff in Error* in No. 72, O.T. 1908, at 4. Finally, in its Opinion, this Court notes that Section 12 of the Philippines Organic Act excepts "such land

provision of the Philippines Organic Act virtually identical (in its relevant parts) to Section 28(b) of the Guam Organic Act.[12] On its face, this ruling is entirely at odds with the result here in which unrecognized aboriginal title attaching to similarly modest acreage, again claimed to be former Spanish Crown land, was effectively defeated by a like Presidential reservation under the purported authority of a like statute, even as to the portions relinquished by the military services as surplus to their needs.[13]

b. Equally inconsistent with the present decision are the subsidiary holdings in *Cariño*. These are of special interest because they affect *both* claims advanced here, the statutory claim under Section 28(b) of the Guam Organic Act and the aboriginal title claim attaching to a lesser acreage.

As this Court itself later explained *Cariño*, "[t]he Court relied chiefly upon the purpose of our acquisition of the Philippines as disclosed by the Organic Act of July 1, 1902, which was to administer property and rights 'for the benefit of the inhabitants thereof.'" *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284-85 n.18 (1955) (quoting 32 Stat. 695).[14] This is, of course, a

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and property as shall be designated by the President for military or other reservations, as this land since has been." 212 U.S. at 459.

[12] Section 28(b) of the Guam Organic Act is quoted in the Appendix, *infra*, at 60a. The full text of section 12 of the Philippines Organic Act of July 1, 1902, 32 Stat. 691, 695, is as follows:

> That all property and right which may have been acquired in the Philippine Islands by the United States under the treaty of peace with Spain, signed December tenth eighteen hundred and ninety eight, except such land or other property as shall be designated by the President of the United States for military and other reservations of the Government of the United States, are hereby placed under the control of the government of said islands, to be administered for the benefit of the inhabitants, except as provided in this act.

[13] To be sure, the court of appeals did not reach the merits of the aboriginal claim, having ruled that the Government of Guam lacked standing to make the argument (an error discussed in a moment). But it left undisturbed the ruling of the district court on this aspect of the case, which can only be understood as a holding that unextinguished aboriginal title cannot be asserted against the United States, at least in the face of a Presidential reservation apparently authorized by Act of Congress.

[14] Although we deal with the point in due course, it is well to stress here that Guam's submission is in no way inconsistent with the actual *holding* of *Tee-Hit-Ton* that the United States is not constitutionally bound to pay compensation when it extinguishes aboriginal land rights. *See* 348 U.S. at 284-85.

reference to Section 12 of the Philippines Organic Act, quoted in footnote 12, *supra*, which enjoins the territorial government, upon receiving federal lands, to administer them in the interest of the natives. *See Cariño*, 212 U.S. at 458-59. As already noted, the provision finds an exact parallel in Section 28(b) of the Guam Organic Act, which likewise directs that the land transferred to the local government shall be "administered for the benefit of the people of Guam." One cannot suggest a reason (and the attempt has not been made) why these virtually identical provisions, the second obviously borrowed from the first, should not have the same import in the Philippines and in Guam, neighboring islands acquired from Spain by the same Treaty of Paris.

In *Cariño* the Court did not restrict the quoted words to their literal context - lands actually transferred to local administration. On the contrary, they were understood as indicating a generous disposition in the Congress that wrote the Philippines Organic Act and were treated as announcing a canon of construction for all its provisions. Thus, the "due process" and "equal protection" clauses of the "bill of rights" included in the Philippines Organic Act (which have their counterpart in Sections 5(e) and (n) of the Guam Organic Act, 48 U.S.C. §§ 1421b(e) and (n)) were read inclusively to protect the natives and their land, even where title was recognized neither by Spain nor by the United States (*Cariño*, 212 U.S. at 459); the implications of a provision empowering the territorial government to perfect titles were minimized (*id.*); and the scope of the "property and rights acquired [in the Philippine Islands] by the United States," which were subject to Presidential reservation, was restricted (*id.* at 459-60). So here, if *Cariño* is followed, the same words in Section 28(b) require that the Section, as a whole, be construed, not woodenly, but generously "for the benefit of the people of Guam," to accommodate their modest claim to acreage no longer needed for the military purposes in whose name it was initially withheld.

3. Also relevant here are the repeated statements in *Cariño* to the effect that any doubt must be resolved in favor of the native claim; as the Court phrased it, "every presumption is and ought to be against the government in a case like the present." 212 U.S. at 460. In some instances, this seems to be tied to the language of the Organic Act just quoted. *E.g.*, *id.* at 459-60. Elsewhere, the Court seems to be announcing a more general principle. Indeed, it

must be so when the presumption is invoked in construing Spanish law. *E.g., Cariño* at 460-63. Given that the Guam Organic Act has the same language, it does not matter. What cannot be ignored, however, is that this Court found the relevant provisions of the Organic Act ambiguous and therefore open to construction, and that it actually applied a rule of construction favoring the native claim in a context indistinguishable from the present case. In holding otherwise, the court below put itself in conflict with *Cariño*.

B. Conflict with "Plain Meaning Rule"

The conflict with *Cariño* is perhaps the most obvious, but it is far from the only, or, in the long term, the most important, respect in which the decisions below clash with the law settled by this Court. If *Cariño* had never been written, irreconcilable conflicts would remain.

Both the district court and the court of appeals were able to avoid relevant canons of construction, and thereby to defeat our argument under Section 28(b) of the Organic Act, only by misapplying the so-called "plain meaning" rule. We refer primarily[15] to the canon that enjoins courts, where possible, to

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[15] Other canons of construction implicated in the case include: the canon that requires reading a statute, where possible, so as to further, rather than defeat, its evident purpose (*e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 575 (1982)); the canon that prefers a construction that gives effect to all the words of a provision, over one that renders some parts surplusage (*e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)); the canon that counsels courts construing a statute to "recur to the history of the times when it was passed" (*e.g., Leo Sheep Company v. United States*, 440 U.S. 668, 669 (1979)), in addition to immediate legislative history and laws *in paria materia* (*e.g., Watt v. Alaska*, 451 U.S. 259, 266-72 (1981)); and the canon directing, when more than a single reasonable reading of the statute is possible, that deference be given to contemporary administrative construction (*e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984)). Somewhat inconsistently with its ruling that Section 28(b) had a "plain meaning," the Court of Appeals purported to answer some of Guam's arguments under these heads. (App. B at 10a-18a.) This is not the place to respond. We do note, however, that after correctly reciting the historical background of Section 28(b) and the Congressional determination to return to Guamanians, directly or through their local government, land appropriated by the Armed Services, but no longer needed for that purpose (App. B at 17a), the court below went on to endorse a reading of the provision that predictably would transfer none of that land to Guam, given

construe in their favor a statute affecting the rights of native people.[16] When confronting Guam's submission on this point, the court below declined even to decide whether the canon might be applicable in the present context,[17] holding that the "clearly expressed intent of Congress" left no room for construction (quoting *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986)). (App. B at 15a). This, we submit, was a plain misapplication of *Catawba* and of the "plain meaning" rule. That rule was never intended to require (or permit) a court to stretch the

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that the Congress must have expected the President to be persuaded, for the moment, to retain all the acreage freshly condemned in the name of national defense.

[16] The court of appeals stated the rule much too restrictively, as applying "when the United States grants lands to native Americans." (App. B at 15a.) Of course, the canon is applicable to treaties and agreements in which the native is deemed to have been at a disadvantage. *E.g.*, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979). But it is much broader, applying to statutes enacted without any participation of the natives and even to provisions designed to *restrict* their rights. *E.g.*, *Solem v. Bartlett*, 465 U.S. 463, 470, 472 (1984) (Cheyenne River and Standing Rock Sioux Reservations Surplus Land Act); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (25 U.S.C. § 194); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (Public Law 280); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968) (Menominee Termination Act of 1954); *United States, ex rel Hualapai Indians v. Santa Fe Pacific R.Co.*, 314 U.S. 339, 354, 356 (1941) (Railroad Land Grant Act of July 27, 1866 and various land grant, land claims, and Indian Reservations statutes). *See also*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985).

[17] This reluctance may have been influenced by the then stance of Federal counsel, vigorously denying the benefit of the canon to the natives of Guam on the ground that they had never been in any trust relationship with the United States. *See Brief for Federal Appellees in the 9th Cir.* at 27-28. In the district court counsel for the United States had added that native Guamanians should be viewed in the same light as native Hawaiians, with whom, it was said, no such special relationship exists. *See Defendants' Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment and in Further Support of Defendants' Motion for Summary Judgment* at 11-12. Today, however, the United States has completely changed position. In an eloquent *Brief for the United States as Amicus Curiae*, filed in No. 98-818, *Rice v. Cayetano*, argued October 6, 1999, the Solicitor General emphatically maintains that there *does* exist a special fiduciary relationship between the United States and native Hawaiians. Presumably, he takes the same view with respect to native Guamanians. At all events, it is premature to assume otherwise and we accordingly do not now argue a matter that may well no longer be at issue. *But see* Point II, *infra*.

words of a statute by doubtful feats of deduction or intuition, informed by no recognized principle of construction, to fill a gap in the text, rather than resorting to well-established canons of construction. That is especially so when the outcome, using the first method, leaves the unanswerable question, "Why would Congress want to do that?" (Here, that unanswerable question is "Why would Congress want lands not needed for military purposes to go to Guam if found surplus immediately after enactment, but not if found surplus more than ninety days later?")

This is not one of those arguably close cases - one in which the "plain meaning" is invoked to sustain "an odd result." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989); *Boston Sand and Gravel Co. v. United States*, 278 U.S. 41, 48 (1928). Obviously enough, a statute may be open to construction, no matter how clear the words actually used, if the text fails to address, or unequivocally to resolve, the particular point at issue. *See Green v. Bock Laundry Machine Co.* 490 U.S. 504, 509 (1989); *id.* at 527 (Scalia, J. concurring); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989); *Griffin, supra,* 458 U.S. at 571, 575; *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1939). That is this case. The statute remains open to consideration because it fails to address, or unequivocally to resolve, the particular point at issue. The question under Section 28(b) of the Guam Organic Act is: What happens to land expressly reserved by the President for military purposes in 1950 which later becomes surplus to the needs of the Armed Services?[18]

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[18] What is more, the construction placed on Section 28(b) by the court of appeal seems to contradict the President's contemporary understanding. Indeed, by § 1 of his Executive Order (App. K at 64a-65a), President Truman established several exclusively military reservations with the express proviso that the Secretary of the Navy, to whom initial custody was given, should allocate the lands encompassed among the Armed Services "as may be required for their respective purposes." But the Secretary was not authorized to assign any of the reserved lands to a non-military federal agency, such as the Fish and Wildlife Service. Nor did the President reserve any such power to himself. There being, at the time, no Federal Property Act or Base Realignment and Closure Act applicable to Guam, the expectation presumably was that when, in due course, military land needs diminished (as was anticipated), the surplus acreage would be released to Guam under Section 28(b). After all, that must be the result if the President had *expressly* reserved the lands "for so long as national defense concerns require" and that is, in fact, the implied term of any military reservation. Or does the

The bare text does not tell us, and the combined efforts of both courts below do not succeed in proving otherwise.

1. We are not sure how much (if at all) the court of appeals relied on the use of the present tense ("is hereby transferred") in the text of Section 28(b) to bolster its conclusion that the text "plainly" ordained a single, "one-time," transfer of land 90 days after the effective date of the Organic Act. However much it did, this is not a sound basis for the court's result since, on *any* reading of the text, the wording cannot be taken literally, given that no transfer could occur until after the President has made his reservations, up to 90 days later. The present tense here necessarily refers to a future event, dependent on what happens in the interim.[19] The choice between a nearer future and a more distant one is surely not a matter that can be resolved on the basis of "plain meaning."

2. Primary reliance for the result reached below rested, it seems, on the 90-day provision in Section 28(b), together with its echo in Section 28(a). (App. I at 60a.) But this is equally false reasoning. Suppose no time limit had been placed on the President's power of reservation: Would it then be conceded that the provision enacted a continuous program of transferring unwanted lands to the territorial government? Presumably so, albeit Guam might have to await a "clearance" from the Federal Government as to any given parcel. The substantial delays likely to accompany such a scheme obviously counseled forcing the President to act more promptly.[20] But there is no justification for

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United States assert that such a stipulation would have been unlawful under Section 28(b)?

[19] That this is not unique is all we meant to demonstrate by analogy to other statutes. (App. L at 66a.) For instance, despite its language of present conveyance, the Submerged Lands Act of 1953 has been read to transfer to the States offshore land now *and later* submerged, but *only so long as they remain submerged. See California, ex rel. State Lands Comm'n v. United States*, 457 U.S. 273 (1982). That, it still seems to us, is comparable to the suggestion that Section 28(b) of the Guam Organic Act should be read to mean that the withholding of land from transfer to Guam lasts only *so long as the original reservation endures* (*"while reserved"* in our shorthand).

[20] We note that the counterpart provision of the Philippines Organic Act, § 12, quoted in n.12, *supra*, did not specify a time limit for the President's action and that more than fifteen months elapsed before the military reservation at issue in *Cariño* was created. Apparently, no conflicting claim to the land was entertained

converting a time limit imposed upon the President, *for the benefit of Guam,* into a harsh, and seemingly pointless, cut-off of the transfer program Congress intended.

3. As for the 90-day provision of Section 28(a), it is a red herring. No doubt, several weeks were thought necessary to segregate "lands used in the civil affairs," just as it was thought appropriate to allow the President some period to decide what lands to withhold. And, unsurprisingly, the same 90-day span was chosen for both purposes. As the court below suggests, this would fix a boundary, for the time being at least, between federally administered lands and those administered by the new government. But, on no reading of Section 28(b) was that boundary meant to be permanent. Even under Guam's more restrictive construction, the line drawn under Section 28(b) could be upset by application of Section 28(c) (as, indeed, it was in 1952) or by special legislative grants (as has occurred over the last several decades).

4. Superficially more troubling is Section 28(c), which provides as follows (App. I at 60a-61a):

> All property owned by the United States in Guam, the title to which is not transferred to the government of Guam by subsection (a) hereof, or which is not placed under the control of the government of Guam by subsection (b) hereof, is transferred to the administrative supervision of the [Secretary of the Interior],[21] except as the President may from time to time otherwise prescribe: *Provided,* That the [Secretary of the Interior] shall be authorized to lease or sell, on such terms as he may deem in the public interest, any property, real or personal, of the United States under his administrative supervision in Guam not needed for public purposes.

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until the President decided how much he would reserve. *See Brief on Behalf of the Plaintiff in Error*, in No. 72, O.T. 1908, at 5.

[21] Here and in the subsequent bracketed passage, we have substituted the revised language enacted in 1968. It should be noted that the Secretary of the Interior had already been designated by Executive Order in 1949 under Section 3 of the Act. *See* "Historical and Statutory Notes" to 48 U.S.C.A. § 1421f.

The court of appeals apparently read the provision as applicable to *all* lands reserved in 1950 and as authorizing the President to shift any such acreage to a non-military federal use, at any time in the future; and, when in the custody of the Secretary of the Interior, to be disposed of by him at any time. Accordingly, the court concluded that Section 28(c) would be "superfluous" under Guam's reading of Section 28(b). (App. B at 19a.) One can debate whether "superfluous" is the accurate characterization, but it is certainly true that the court's novel construction of Section 28(c) is inconsistent with our argument under Section 28(b).

The court below went astray, we submit, in supposing that Section 28(c) applies to *all* lands reserved in 1950, including lands initially reserved for military purposes. On its face, the wording of the provision is ill-suited to that result. Indeed, if all reserved property is affected, one wonders why Section 28(c) does not simply begin with "All property reserved by the President under subsection (b)," instead of a longer phrase that, at first blush, sends us vainly searching for federal lands not covered either by subsection (a) or subsection (b).[22] Still more puzzling is why lands reserved by the President specifically for military purposes, and which, for some time, had already been so dedicated, should, at least initially, be "transferred to the administrative supervision of the Secretary of the Interior." Also, given the universal understanding that most, if not all, lands withheld from transfer to Guam were lands deemed required for national defense, it is very odd that military control of its own lands should be dealt with in a belated "except" clause. And, finally, is it conceivable that the Secretary of the Interior was meant to be given discretion to dispose of lands condemned and reserved for military purposes while they were temporarily in his custody?

All these difficulties disappear if, for a moment, we allow ourselves to read a page of history. First, we note that, unlike Section 28(b), nothing comparable to Section 28(c) appears in the

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[22] The most plausible conjecture is that the draftsman intended to deal with federal lands dedicated to "civil" uses in subsection (a), with lands dedicated to military uses in subsection (b), and to "vacant" lands not dedicated to any use (mainly, if not exclusively, former Spanish "Crown lands") in subsection (c), but that this neat division got muddled when he worded subsection (b) to embrace "[a]ll other property." At all events, we must accept that, as written, subsection (b) includes lands covered by subsection (c).

Organic Acts for the other islands acquired from Spain in 1898. In the case of Guam, uniquely, there was a special resettlement problem at the time the Organic Act was written, shortly after the end of World War II, because a large segment of the native population lost their homes and farms in the massive bombardment of the island prior to its recapture in mid-1944 and, shortly afterwards, through the very substantial eviction of civilians by the American military forces. To deal with this situation, the Guam Land Transfer Act of 1945 (App. G at 58a) was passed and, in due course, substantial "replacement" lands, mainly unused former Spanish Crown lands, were identified as eligible for transfer to Guamanians, via the "Naval Government of Guam," the predecessor of the Territorial Government. For reasons not entirely clear, however, very little of this acreage had actually been transferred by 1950 and it was evidently deemed appropriate to make provision in the Organic Act for carrying out the program. This, we suggest, is what Section 28(c) was addressed to, nothing more.

Our submission is not mere conjecture. It evidently reflects the view taken by the Executive Branch at the time. Thus, in 1950 when President Truman made his reservations under the Organic Act, he indicated his understanding that Section 28(c) had only a limited application, having been crafted to deal with the "resettlement" or "replacement" lands recently identified (within the Armed Services) as not needed for military purposes; witness his explicit reference to subsection (c) in his reservation of those lands (Exec. Order No. 10178, sec. 2; App. K at 65a), and his omission of any such reference in connection with his military reservations (*id.*, sec. 1; App. K at 64a-65a.) And that was apparently also the understanding of the Secretary of the Interior when, eighteen months later, he invoked Section 28(c) in releasing the "resettlement" lands to Guam, under specific conditions. *See* Deed of Transfer, February 26, 1952 [G.Exh. 18].[23]

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[23] There are, it should be stressed, substantial differences between a transfer under subsection (c) and one under subsection (b). In the latter case, the transfer occurs (at least in theory) by operation of law and there is no power in the Executive Branch to impose conditions. Thus, the few acres of tidelands at Ritidian Point that, it is now agreed, inured to Guam when they were omitted from the 1950 Presidential reservations, passed without condition and, indeed, without any instrument of conveyance. *Per contra*, the transfer of the

Nor did this administrative construction change with time. When the former Naval Communications Center at Ritidian (the subject of Guam's First Claim) was transferred to the Fish and Wildlife Service in 1993, Section 28(c) was not invoked (as presumably it should have been under the court of appeals' reading). And, today, counsel for the United States insist (correctly, we believe) that subsection (c) was "fully spent" in 1952 when the "resettlement" lands were conveyed to Guam. The upshot is that our reading of Section 28(b) *as applied to lands reserved for military purposes* (the only subject of this case) does *not* render Section 28(c) superfluous. The latter was designed for a specific situation and has fully served that role.

The truth is that the answer to the dispositive question under Guam's Organic Act argument - whether or not Section 28(b) enacts a continuing program or makes only a "one-time" grant - is not to be found by parsing the bare words of that Section or the related provisions of the Act. On the other hand, all applicable canons of statutory construction point in the same direction (a most unusual circumstance). Certainly, there can be no debate that Guam's argument must be sustained if the canon requiring the resolution of doubts in favor of native claims is applied. In refusing to invoke it here, the courts below have perverted the "plain meaning" rule in derogation of this Court's clear teaching.

C. Conflict with Precedents Governing Standing to Assert an Aboriginal Title Claim

In dismissing the aboriginal title claim on the sole ground that Guam was not the proper plaintiff (App. B at 20a), the court of appeals overlooked or misread relevant precedents.

1. The fact that Guam is neither a "tribe" nor an individual landowner is not a proper basis for disqualifying it from asserting aboriginal title on behalf of the natives of the Island. In the first place, the doctrine of aboriginal titie is not dependent on any particular kind of ownership. That tribes have been the usual plaintiffs in cases of this sort is simply a reflection of the historical circumstance that, in the continental United States, the land rights

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"resettlement" acreage just discussed was a purely discretionary act by the Secretary of the Interior to which he could, and did, attach reversionary clauses.

of the aboriginal inhabitants were usually communally held by tribes. But the principle on which native land interests are respected in American law is much broader, derived as it is from international law, basically of Spanish origin. *See* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States,* 31 Geo.L.J. 1, 15-21 (1942); Felix S. Cohen, *Original Indian Title,* 32 Minn.L.Rev. 28, 43-47 (1947). The governing Spanish *Laws of the Indies,* which applied indiscriminately in all the Spanish possessions, made no distinction as between lands held communally and those held individually, nor as between those held by a "tribe," defined by ethnicity, those held by a "pueblo" or "rancheria," defined geographically, and those held by a society, defined politically. Decisions of this Court sufficiently illustrate the point. *E.g., Jones v. Meehan,* 175 U.S. 1 (1899); *Cariño v. Insular Government of the Philippine Islands,* 212 U.S. 449 (1909); *Cramer v. United States,* 261 U.S. 219 (1923); *United States v. Candelaria,* 271 U.S. 432 (1926); *United States v. Dann,* 470 U.S. 39, 50 (1985).

In any event, there is no inflexible rule that the plaintiff initiating the litigation must be the owner. Suits under particular statutes sometimes restrict the character of the eligible litigant. But when, as here, no such condition is prescribed, the courts have taken a very relaxed view as to who properly may be the plaintiff. Native claims have been represented in court by tribal chiefs (*e.g., Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867); *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903)), by an Indian superintendent (*e.g., Superintendent of Five Civilized Tribes v. Commissioner,* 295 U.S. 418 (1935)), by a group acting for all the Indians within a State (*e.g., Thompson ex rel. Indians of California v. United States,* 122 Ct. Cl. 348, 356-57, 358-61, *cert. denied,* 344 U.S. 856 (1952)); by the United States (*e.g., Heckman v. United States,* 224 U.S. 413 (1912)); or by a State through its Attorney General (*e.g., Indians of California v. United States,* 98 Ct. Cl. 583 (1942), *cert. denied,* 319 U.S. 764 (1943); *Indians of California,* 102 Ct. Cl. 837 (1944)).[24] In the absence of any presently identified

[24] To be sure, in this instance, a special jurisdictional Act provided that the California Attorney General could present the claims to the Court of Claims. Act of May 18, 1928, ch. 624, 45 Stat. 602, 25 U.S.C. § 654. But this appears to be no more than acquiescence in the decision, previously taken at the State level, that

descendants of the aboriginal owners in this case,[25] there ought to be no objection to their representation by the Government of Guam. Guam, it should be stressed, is not claiming for itself, but only as a specie of "parens patriae," prepared, in due course, to make appropriate disposition or dedication of the lands affected in accordance with a later determination of the true owners. This is especially appropriate given the refusal of the United States to pursue the claims and the unique fact that in Guam the present population is substantially descended from the original natives.

2. What we suggest is in no way inconsistent with the proposition that "tribal rights to Indian lands [are the] exclusive province of federal law," nor with the principle that "[only] Congress can delegate its authority over aboriginal land rights." (App. B at 20a.) Neither of these axioms casts any doubt upon the standing of the Government of Guam to assert aboriginal rights on behalf of the native titleholders. On the contrary, the first case quoted by the court of appeals (*Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974)), together with its sequel (*County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 241-44 (1985) (*"Oneida II"*)), establishes that the failure of the federal executive to assert aboriginal claims does not extinguish them or bar their assertion by others. *See also,* 28 U.S.C. § 1362. And the second case invoked (*Turtle Mountain Band of Chippewa Indians v. United States,* 490 F.2d 935, 953 (Ct. Cl. 1974)) confirms that no one, unless clearly authorized by Congress, can abrogate those rights.

In sum, the precedents reflect the tradition that native title is jealously protected by federal law *against impairment or destruction* at the hands of the State, third persons, or unauthorized federal officers. But nothing in these cases or others prevents the *vindication* of aboriginal rights by appropriate representatives when the United States, as here, denies the claims, or when it simply defaults.

California would attempt to vindicate the aboriginal claim of all Indians within the State. *See* Cal.Stats. 1927, ch. 643, p. 1092.

[25] It is not essential, at this point, to determine how the aboriginal land should be allocated among the successors of the aboriginal owners, or otherwise dealt with. That can be left to another day. *See Fishing Vessel Ass'n,* 443 U.S. at 671.

D. Conflict with Precedents Allowing Assertion of Aboriginal Title against the United States

As already noted, the court of appeals, rejecting Guam's aboriginal claim for lack of standing, left undisturbed the district court's apparent holding that no such claim can ever prevail against the United States. This has never been the law.

In at least four landmark cases, this Court early made clear that the Executive Branch, absent express Congressional authorization, cannot extinguish aboriginal title, even though that title had not been recognized by the United States or any prior "colonial" sovereign. *Cariño, supra* (Presidential reservation of native land under ambiguous statute ineffective); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) ("threatened disposal by [federal] administrative officers" of Pueblo lands would be an enjoinable "act of confiscation"); *Cramer v. United States*, 261 U.S. 219, 231-32 (1923) (leases of native land by federal officers and a patent executed by the President ineffective); *United States, ex rel. Hualapai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. at 354-56 (forcible eviction from aboriginal lands by Federal Forces held ineffective to extinguish native title). Nor is there today any viable argument that these precedents have been eroded by the decision in *Tee-Hit-Ton*. The attempt to extend the broader dicta of that case beyond the Just Compensation context has been firmly rejected, most explicitly in the Ninth Circuit. *See United States v. Dann*, 873 F.2d 1189, 1196 n.5 (9th Cir. 1989), *cert. denied*, 493 U.S. 890 (1989).[26] Indeed, the law cannot be that the aboriginal rights of Native Americans depends upon the stance taken by the Department of Justice in litigation.

The only remaining question on this score is whether the aboriginal title of native Guamanians (assuming it survived until 1950) was extinguished by the President's inclusion of the affected land in military reservations. There is, in fact, no

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[26] "We reject the government's argument that aboriginal title can never be asserted against the government. Aboriginal title can be extinguished by Congress or with the authorization of Congress. *Dann II*, 706 F.2d 919, 928-29 (9th Cir. 1983). If an executive officer or agency attempts to extinguish aboriginal title without any congressional authorization, the title holder must be able to protect the title by asserting it against the officer or agency." 873 F.2d at 1196 n.5.

indication whatever that the President appreciated that he was doing so. But, in any event, Section 28(b) of the Organic Act does not remotely qualify as a "plain and unambiguous" law evincing a "clear and plain" intention to extinguish aboriginal title or to authorize the President to do so. *See Hualapai Indians*, 314 U.S. at 346, 353-55, quoted and followed in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985). Indeed, construed most favorably to the native claimants, as it must be, Section 28(b) can be read *not* to condone the incorporation in reservations of lands as to which aboriginal title subsists. *See Cariño*, 212 U.S. at 459-60 (construing the counterpart provision of the Philippines Organic Act). At most, as Guam has submitted, it should be construed as permitting a temporary "borrowing" of those lands for the time required by the exigencies of national defense. So understood, Section 28(b) permits the United States to retain its rights as trustee over aboriginal lands *for the time being*, but directs the transfer to the Government of Guam of the future reversion of those rights, effective whenever the military need for the lands ceased. This is, of course, an independent ground for sustaining Guam's standing as plaintiff here.

II. The Errors Below Involve Matters of Recurring Importance That Call for Correction by this Court

A. Relevance of the Context to the Grant of Certiorari

At first blush, one might be tempted to dismiss the present case as not a serious candidate for review by this Court, on the ground that it involves questions of very local interest only, which, whether or not correctly decided, are of no recurring importance. After all, the conflict between the decision below and *Cariño* is, as a practical matter, largely mooted by the independence of the Philippines, and any prospect that the Ninth Circuit's construction of the Guam Organic Act might be applied to Puerto Rico, the only other remaining United States territory acquired from Spain by the Treaty of Paris, is long since removed by new constitutional arrangements that have converted that territory to a largely self-governing Commonwealth. Ironically, Hawaii advanced this argument in unsuccessfully opposing the Petition for Certiorari in No. 98-818, *Rice v. Cayetano*, argued October 6, 1999. *See*

Respondent's Brief in Opposition, 11. The point is no better here and, again, ought not prevail against stronger reasons for the Court's intervention.

1. Needless to say, blatant disregard of a clear precedent of this Court, no matter how long forgotten, is never lightly to be condoned. It is a matter of judicial integrity that must always be of concern, whether or not the underlying events occurred in a "far away" time and place. Thus, the "exotic" setting of the case cannot diminish the gross misuse of the "plain meaning" rule in reading statutes indulged by both courts below. Increasingly, it seems, lower federal courts are tempted (albeit selectively) to resolve statutory questions by resort to complex word games, restricted to the vocabulary of the text, even when a glance at history and appeal to common sense canons of construction would readily, and more reliably, supply the answer. This appears to be an over-reaction to this Court's criticism of the opposite tendency. Only this Court can supply the guidance that will redress the balance, and the present case, we submit, is a convenient vehicle for that purpose.

2. In fact, the subject matter of this case - the rights of native Americans, their land rights as well as other fundamental rights deeply rooted in our political history - is an added reason for this Court's intervention. From the beginning, final resolution of the sensitive issues involved in this field of litigation has been a duty undertaken by the highest Court of the Nation.[27] That is no doubt

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[27] A very abbreviated sampling includes: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); *Chouteau v. Malony*, 57 U.S. (16 How.) 87 (1853); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *United States v. Forty-three Gallons of Whisky.*, 93 U.S. 188 (1876); *United States v. McBratney*, 104 U.S. 621 (1882); *Ex Parte Crow Dog*, 109 U.S. 556 (1883); *Elk v. Wilkins*, 112 U.S. 94 (1884); *United States v. Kagama*, 118 U.S. 375 (1886); *Talton v. Mayes*, 163 U.S. 376 (1896); *Ward v. Race Horse*, 163 U.S. 504 (1896); *Jones v. Meehan*, 175 U.S. 1 (1899); *United States v. Rickert*, 188 U.S. 432 (1903); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *United States v. Winans*, 198 U.S. 371 (1905); *Winters v. United States*, 207 U.S. 564 (1908); *Cariño v. Insular Government of the Philippine Islands*, 212 U.S. 449 (1909); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665 (1912); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Nice*, 241 U.S. 591 (1916); *Williams v. City of Chicago*, 242 U.S. 434 (1917); *Turner v. United States*, 248 U.S. 354 (1919); *Lane v. Pueblo of Santa Rosa*, 249

in part because, almost by definition, competing claims of sovereignty are implicated, as they are when State and Nation dispute offshore boundaries. *Cf. California, ex rel. State Lands Comm'n*, 457 U.S. 273, 277 n.6 (1982); *United States v. Alaska*, 422 U.S. 184, 186 n.2 (1975) (indicating that such cases, although within the concurrent jurisdiction of other courts, are appropriately initiated in this Court). *See Oneida II*, 470 U.S. at 236-50. And rightly so, since resolution of the controversy usually depends as much on the historic "backdrop" as on written texts or established precedents. *E.g., McClanahan, v. Arizona Tax Comm'n*, 411 U.S. 164, 171-73 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-45 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). That remains the reality today.

What has just been said, we appreciate, argues for the grant of certiorari in *all* cases like this one – not a practical solution. The next best thing is to ask the Court to provide the tools. A significant response historically has been to re-affirm the special rule favoring native rights in the construction of ambiguous

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U.S. 110 (1919); *Cramer v. United States*, 261 U.S. 219 (1923); *United States v. Candeleria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. U. S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *United States,. ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *Board of County Comm'rs v. Seeber*, 318 U.S. 705 (1943); *Williams v. Lee*, 358 U.S. 217 (1959); *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Arizona v. California*, 373 U.S. 546 (1963); and *sequel*, 460 U.S. 605 (1983); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973); *Keeble v. United States*, 412 U.S. 205 (1973); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Mazurie*, 419 U.S. 544 (1975); *Fisher v. District Court*, 424 U.S. 382 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *United States v. Antelope*, 430 U.S. 641 (1977); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *United States v. Mitchell*, 463 U.S. 206 (1983); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

statutes. But when, as here, that canon is shunned, it must fall to this Court to remind inferior courts that applying it is not a matter of discretion.

3. For the natives of Guam, moreover, there is more at stake than a question of principle. Although *Cariño* has no further force in the Philippines, it remains an important precedent in Guam, governing present land rights. If our arguments prevail, the decision here will govern not only the acreage involved in this case, but also any future release of land on the Island originally reserved for military purposes but no longer needed for national defense.

B. Relevance of *Rice v. Cayetano*

Finally, it is not irrelevant that, as already noted, the Court has very recently heard oral argument in No. 98-818, *Rice v. Cayetano*, a case that may well turn on some of the same questions involved here. Thus, several of the briefs in *Rice*, among them that of the United States (*Brief for the United States as Amicus Curiae Supporting Respondent*), back their conclusion that electors for the trustees of the Office of Hawaiian Affairs constitutionally may be restricted to descendants of the aboriginal inhabitants by stressing the existence of a special fiduciary relationship between the United States and the natives of Hawaii, and incidentally assert that Hawaiians are no less entitled to enjoy the benefits of that relationship because they are not organized as 'tribes'. These were issues in the present case.

What is more, in this Court the Solicitor General apparently takes a position on these matters directly at odds with the submission of Federal counsel in our case in the courts below. We do not say, of course, that this Court sits to ensure consistency in Government arguments. But when the outcome in a case not yet final might well be different if the United States had advanced its present view in that case, and no possible prejudice can result, nor any cost to the Court's crowded docket, this is surely a proper consideration in deciding whether to grant certiorari. Neither the principle of equal justice for all, nor the prohibition on advisory opinions, requires us to ignore what chronology normally would reveal.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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November 10, 1999

APPENDIX A

THE GOVERNMENT OF GUAM, ex rel.
THE GUAM ECONOMIC DEVELOPMENT AUTHORITY,
Plaintiff-Appellant,
v.
THE UNITED STATES OF AMERICA, THE DEPARTMENT OF DEFENSE, THE DEPARTMENT OF THE NAVY, THE DEPARTMENT OF THE AIR FORCE, THE DEPARTMENT OF THE INTERIOR, THE UNITED STATES FISH AND WILDLIFE SERVICE, and THE GENERAL SERVICES ADMINISTRATION,
Defendants-Appellees.

No. 97-17140

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1999 U.S. App. LEXIS 18691; 99 Cal. Daily Op. Service 6474; 99 Daily Journal DAR 8269

August 12, 1999, Filed

PRIOR HISTORY: Amended Opinion of June 4, 1999, Reported at: *1999 U.S. App. LEXIS 11340.*

COUNSEL: For GOVERNMENT OF GUAM, Plaintiff - Appellant: John Briscoe, Esq., WASHBURN BRISCOE & MCCARTHY, Michael K. Pignato, Esq., WASHBURN, BRISCOE & McCARTHY, San Francisco, CA; Andrew M. Gayle, Esq., GAYLE & TEKER, Agana, GU.

For UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF DEFENSE, DEPARTMENT OF NAVY, DEPARTMENT OF THE AIR FORCE, DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, GENERAL SERVICES ADMINISTRATION, Defendants - Appellees: Ellen J. Durkee, Esq., U.S. DEPARTMENT OF JUSTICE, Margo D.

Miller, Esq., DOJT - DEPARTMENT OF JUSTICE, Washington, DC; Mikel W. Schwab, Esq., OFFICE OF THE U.S. ATTORNEY, Agana, GU.

OPINION:

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING

The opinion filed June 4, 1999, is amended as follows:

On slip opinion page 5603, in the quotation delete emphasis presently used and instead emphasize "are hereby" and "vested in." Then in the sentence following the quotation and citation replace "is hereby determined" with "are hereby . . . vested in."

With this amendment, the petition for rehearing is DENIED.

APPENDIX B

THE GOVERNMENT OF GUAM, ex rel.
THE GUAM ECONOMIC DEVELOPMENT AUTHORITY,
Plaintiff-Appellant,
v.
THE UNITED STATES OF AMERICA, THE DEPARTMENT OF DEFENSE, THE DEPARTMENT OF THE NAVY, THE DEPARTMENT OF THE AIR FORCE, THE DEPARTMENT OF THE INTERIOR, THE UNITED STATES FISH AND WILDLIFE SERVICE, and THE GENERAL SERVICES ADMINISTRATION,
Defendants-Appellees.

No. 97-17140

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

179 F.3d 630; 1999 U.S. App. LEXIS 11340; 99 Cal. Daily Op. Service 4270; 99 Daily Journal DAR 5451

June 4, 1999, Filed

SUBSEQUENT HISTORY: As Amended on Denial of Rehearing August 12, 1999, Reported at: *1999 U.S. App. LEXIS 18691.*

PRIOR HISTORY: Appeal from the District Court of Guam. D.C. No. CV-95-00111-JSU. John S. Unpingco, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: John Briscoe and Michael K. Pignato, Washburn, Briscoe & McCarthy, San Francisco, California, for the plaintiff-appellant.

Margo D. Miller, United States Department of Justice, Washington, D.C., for the defendants-appellees.

JUDGES: Before: Jerome Farris, John T. Noonan, and Susan P. Graber, Circuit Judges.

OPINION:

GRABER, Circuit Judge:

The government of Guam brought this action against the United States, alleging that it is entitled to own or control about 24,000 acres of land pursuant to the Organic Act of Guam, the Territorial Submerged Lands Act, and the doctrine of aboriginal title. The district court disagreed and granted summary judgment to the United States. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are not in dispute. In 1898, Spain ceded Guam, including 41,859 acres of Spanish-owned property (crown land), to the United States. In that same year, the President of the United States placed Guam under the control of the Department of the Navy. Guam remained under the Navy's control until 1941, when Japan captured the island during World War II.

After the United States recaptured Guam in 1944, it increased its military presence on the island. That increased presence required more land, which the United States continued to acquire until 1950.

In 1950, Congress passed the Organic Act of Guam, which established a civil government in Guam. Pursuant to that Act, the United States gave to the newly created government 1,250 acres of land that the naval government of Guam had used in the administration of civil affairs. However, the United States retained more than 42,000 acres of land that it had been using for other purposes.

Between 1950 and 1991, the United States condemned new land in Guam at least once (186.87 acres in 1962) and occasionally

transferred unneeded land to the government of Guam (879 acres in the early 1980s and 3,200 acres in 1994). In 1992, the Navy declared to be "excess" (a) 371 acres of land at Ritidian Point and (b) 15,571 acres of submerged land adjacent to the property. The Navy transferred the 371 acres of dry land to the United States Fish and Wildlife Service for use as part of a wildlife refuge and transferred the 15,571 acres of submerged land to the General Services Administration for later redistribution.

In April 1995, the Department of Defense published the "Guam Land Use Plan 1994." That plan identified another 8,200 acres of land in Guam that the United States military did not need.

On September 22, 1995, the government of Guam brought this action against the United States to acquire title to or control over (1) the 371 acres of land at Ritidian Point, (2) the 15,571 acres of submerged lands adjacent to Ritidian Point, and (3) the 8,081 acres of other land in Guam that is no longer needed for military purposes.[1] Guam argued that it was entitled to that land pursuant to the Organic Act of Guam, the Territorial Submerged Lands Act, and the doctrine of aboriginal title.

Thereafter, the parties filed cross-motions for summary judgment. The district court granted the United States' motion. Guam moved for reconsideration, which the district court denied. This timely appeal ensued.

STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment to determine "whether the district court correctly applied the law and if, viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact." *Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998).*

[1] Guam's original complaint sought 22,477 acres of "other" land. Guam filed an amended complaint on November 9, 1995, reducing its request to 8,081 acres.

ORGANIC ACT OF GUAM

A. Statutory Framework

On August 1, 1950, Congress passed the Organic Act of Guam (Organic Act). See Organic Act of Guam, Pub. L. No. 630, 64 Stat. 384 (1950) (codified at *48 U.S.C. § 1421* et seq.).[2] The Act establishes and defines the power of a civil government in Guam. See § 3 (codified at *48 U.S.C. § 1421a);* see also § 5 (codified at *48 U.S.C. § 1421b)* (establishing the Guam Bill of Rights); Kenda K. Tornes, State Taxation of Puerto Rican Obligations: An Interest(ing) Question, *66 Chi.-Kent L. Rev. 903, 930 (1992)* ("Congress enacted the 'Organic Act of Guam' to provide a civil government for Guam.").

To help the newly established government, Congress transferred to it some of the property that the United States owned in Guam. First, Congress unconditionally transferred title to all property owned by the United States that the naval government of Guam had used "in the administration of the civil affairs of the inhabitants":

> The title to all property, real and personal, owned by the United States and employed by the naval government of Guam in the administration of the civil affairs of the inhabitants of Guam, including automotive and other equipment, tools and machinery, water and sewerage facilities, bus lines and other utilities, hospitals, schools, and other buildings, shall be transferred to the government of Guam within ninety days after the date of enactment of this Act.

§ 28(a) (codified at *48 U.S.C. § 1421f(a)*). The land at issue here was not "employed by the naval government of Guam in the administration of the civil affairs" and, thus, Guam did not receive an unconditional grant of that land.

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[2] The enacted wording and the codified wording of the Act differ slightly. We rely on the enacted version. See *Trailer Train Co. v. Leuenberger, 885 F.2d 415, 416 n.2 (8th Cir. 1988)* ("The language of *49 U.S.C. § 11503* codifying Section 306 differs from the language of Section 306 as enacted. The court relies on the language used in Section 306.").

Subsection (b) transferred control over the remainder of the property that the United States owned in Guam, subject to one limitation:

> All other property, real and personal, owned by the United States in Guam, not reserved by the President of the United States within ninety days after the date of enactment of this Act, is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable.

§ 28(b) (codified at *48 U.S.C. § 1421f(b)*) (emphasis added). The land at issue here was "other property . . . owned by the United States."[3] However, the President reserved that land for the United States on October 30, 1950, which was a date "within ninety days after the date of enactment of this Act." See Executive Order No. 10178, *15 Fed. Reg. 7313 (1950)*, reprinted at *48 U.S.C. § 1421f*. Thus, the land did not pass to Guam in 1950.

Guam argues, however, that § 28(b) has continuing force and requires the United States to transfer all property that it owns in Guam that is no longer used for a military purpose. Because the land at issue here is no longer needed for a military purpose, Guam argues that § 28(b) entitles it to control that land.

B. Statutory Text and Context

"When interpreting a statute, this court looks first to the words that Congress used." *Sanchez v. Pacific Powder Co., 147 F.3d 1097, 1099 (9th Cir. 1998)*. "Rather than focusing just on the word or phrase at issue, this court looks to the entire statute to determine Congressional intent." Id. If the wording of the statute unambiguously demonstrates Congressional intent, we need look no further. See *Sloan v. West, 140 F.3d 1255, 1261 (9th Cir. 1998)*

[3] When Congress passed the Organic Act, the United States had not yet acquired 183.7 acres of the land at issue here.

("If the intent of Congress is clear from the face of the statutory language, we must give effect to the unambiguously expressed Congressional intent.").

The plain wording of § 28(b) establishes that Congress intended a one-time grant of property. Section 28(b) contains two interrelated clauses. The first clause gives the Guamanian government control over all property not already transferred to it under § 28(a). The second clause, however, conditions that grant on the President's not reserving the property within 90 days: "All other property . . . owned by the United States in Guam, not reserved by the President of the United States within ninety days after the date of enactment of this Act, is hereby placed under the control of the government of Guam . . . ." § 28(b) (emphasis added).

After 90 days, the condition was satisfied and the grant of property was complete: Guam owned or controlled all the property previously owned by the United States, except for the property that the President had reserved. Nothing in the wording of the statute suggests that § 28(b) has continuing force or that § 28(b) requires the United States to transfer all property that it owns in Guam that is no longer used for a military purpose.

Context supports the plain meaning of subsection (b). First, Congress included a similar 90-day provision in subsection (a): "The title to all property . . . shall be transferred to the government of Guam within ninety days after the date of enactment of this Act." Congress' choice to fix Guam's right to property under subsection (a) after 90 days suggests that Congress intended similarly to fix Guam's right to property under subsection (b) after 90 days.

Second, subsection (c) provides:

> All property owned by the United States in Guam, the title to which is not transferred to the government of Guam by subsection (a) hereof, or which is not placed under the control of the government of Guam by subsection (b) hereof, is transferred to the administrative supervision of the head of the department or agency designated by the President under section 3 of this Act, except as the President may from time to time otherwise prescribe: Provided, That the head of such department or

> agency shall be authorized to lease or to sell, on such terms as he may deem in the public interest, any property, real and personal, of the United States under his administrative supervision in Guam not needed for public purposes.

§ 28(c) (codified at *48 U.S.C. 1421f*(c)) (emphasis added, except emphasis on "Provided").[4] The final clause of subsection (c) allows the United States to sell property that the President reserved under subsection (b). That provision can have meaning only if Congress intended for subsection (b) to constitute a one-time grant of property. Under Guam's reading of the statute, Congress' inclusion of the last clause is superfluous - the United States never could sell any property, because the property would revert to Guam automatically as soon as it was "not needed for public purposes." This court generally refuses to interpret a statute in a way that renders a provision superfluous. See *Burrey v. Pacific Gas & Elec. Co., 159 F.3d 388, 394 (9th Cir. 1998)* ("In interpreting a statutory provision, we must avoid any construction that renders some of its language superfluous.").

Moreover, Guam's argument - that § 28(b) requires the United States to transfer control to Guam over all property not used for a military purpose - would eviscerate another of subsection (c)'s provisions. Subsection (c) gives the President the authority to choose the department that will control the property reserved under subsection (b). Under Guam's interpretation of the Act, the President could give control over the property to a non-military agency such as the Department of Education, but if that agency used the property for a non-military purpose, then the property would revert to Guam. Guam's interpretation thereby robs subsection (c) of its practical meaning.

A contextual reading of the Organic Act thus supports the plain meaning of subsection (b): Congress intended to provide Guam with a one-time grant of property, a grant that became fixed 90 days after enactment of the Organic Act. Therefore, we hold

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[4] Congress amended subsection (c) in 1968 to give control over the property to the Secretary of the Interior, unless the President provides otherwise. *See* Pub. L. No. 90-497, 82 Stat. 848 (1968).

that the wording of the Organic Act unambiguously demonstrates Congressional intent.

C. Guam's Arguments

Guam nevertheless presents six reasons why Congress intended for § 28(b) to have continuing force. We consider each in turn.

1. Guam's Reading of § 28(b)

Guam argues that, when Congress drafted § 28(b), it intended for the phrase "is hereby placed" to mean "is hereby ordained to be placed when the appropriate circumstances arise." Similarly, Guam asserts, Congress intended for the phrase "not reserved" to mean "while reserved." Guam thus concludes that Congress intended for § 28 to read:

> All other property, real and personal, owned by the United States in Guam, [while reserved] by the President of the United States within ninety days after the date of enactment of this Act, [is hereby ordained to be placed when the appropriate circumstances arise] under the control of the government of Guam, to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable.

Were we to accept Guam's significant redrafting of the statute, then Guam might be entitled to the land at issue. However, we are bound by the words that Congress actually used. See *United States v. Great Northern Ry. Co., 343 U.S. 562, 575, 96 L. Ed. 1142, 72 S. Ct. 985 (1952)* ("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written."); *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 437 (9th Cir. 1992)* ("Separation of powers principles and the value of democratic rule prohibit us from 'interpreting' [a] statute such that we are, in fact, amending [it].").

2. Section 33

Guam next argues that § 33 of the Organic Act authorizes the President to reserve land for military purposes. According to Guam, if we interpret § 28(b) as a one-time grant, then § 33 is superfluous.

Section 33 states:

> Nothing contained herein shall be construed as limiting the authority of the President to designate parts of Guam as naval or military reservations, nor to restrict his authority to treat Guam as a closed port with respect to the vessels and aircraft of foreign nations.

(Codified at *48 U.S.C. § 1421k.)* As is apparent, § 33 is not an operative provision but, instead, is a provision designed to protect against reading implications into the Organic Act. See *Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641, 645 (9th Cir. 1993)* (so interpreting a similar provision in the Equal Access Act).

Our interpretation of § 28(b) does not render § 33 superfluous. In § 28(b), Congress authorized Guam to control, but not to own, federal public land - land that the President did not reserve within 90 days of enactment. Section 33 simply ensured that, to the extent that Guam received control of such land, nothing in the Act prevented the President from taking back control of the land if needed later for a military purpose. Whether § 28(b) provides a one-time or a continuing grant of property, § 33 still serves this intended purpose.

3. Interpretation of Similar Statutes

Third, Guam argues that its reading of the Organic Act is mandated by the Supreme Court's interpretation of similar statutes. We disagree.

Guam relies first on the Supreme Court's interpretation of the Utah Enabling Act, which states in part:

> That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior . . . .

Utah Enabling Act, Pub. L. No. 138, 28 Stat. 109 (1894) (emphasis added). In *Andrus v. Utah, 446 U.S. 500, 64 L. Ed. 2d 458, 100 S. Ct. 1803 (1979),* the Supreme Court held that Utah's right to indemnity or "in lieu" land (lands to replace land sold by the United States) did not become "vested" when Utah became a state. Guam suggests that the Court reached that decision by holding that the phrase "hereby granted" constituted a continuing grant of land. Guam reasons that we must give the term "hereby" a similar meaning in the Organic Act.

Contrary to Guam's argument, the Court did not rely on the phrase "hereby granted." Instead, the Court held that it was unnecessary to decide whether the Act constituted a present or future grant of land, because the Act granted specific, numbered parcels of land. See *id. at 506-07.* Accordingly, title to the land did not vest until Utah actually surveyed the land: "Whether the Enabling Act contained words of present or future grant, title to the numbered sections did not vest in the State until completion of an official survey." *Id.* Until Utah satisfied that condition, the United States "remained free to dispose of the designated lands." *Id. at 507;* see *id. at 508 n.10* ("Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them.") (citation and internal quotation marks omitted) (emphasis in original). Thus, the right to indemnity or "in lieu" lands did not become fixed until Utah had satisfied the condition of the Act. See *id. at 507.* "Because much of the State was not surveyed until long after its

admission to the Union, its indemnity or 'in lieu' selections were not made promptly." *Id. at 502.*

Indeed, rather than supporting Guam's argument, Andrus supports our interpretation of the Organic Act. As in Andrus, the Organic Act provided a grant of land subject to a condition: that the President not reserve the land within 90 days. That condition was satisfied 90 days after the effective date of the Organic Act. At that time, the rights of all parties became fixed: Guam received all land that the President had not reserved.

Guam also relies on the Supreme Court's interpretation of the Submerged Lands Act of 1953, which states in part:

> It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . . .

43 U.S.C. § 1311(a) (emphasis added). Guam argues that the Supreme Court interpreted the phrase "are hereby . . . vested in" as a continuing grant of land. Once again, we are not persuaded.

The Submerged Lands Act does "hereby" grant the states certain rights. However, the Act defines the boundaries of the land grant using ambiguous terms. For example, Congress did not define the term "inland waters," even though the location of such waters necessarily changes over time due to erosion, accretion, and reliction. See *United States v. Louisiana, 394 U.S. 11, 33, 22 L. Ed. 2d 44, 89 S. Ct. 773 (1969)* (The Louisiana Boundary Case) ("The shoreline is constantly shifting as the Mississippi River and violent Gulf storms remold the soft, silt-like delta soil."). Thus, the question before the Court was whether to fix the boundary at a specific date or leave it ambulatory, changing as the coastline changes:

> The 1845 coastline has been substantially modified by extensive erosion and some accretion in the intervening period of more than a century. This modification has occasioned a dispute between the United States and Texas

> as to whether the [Act] . . . is to be read as measuring from the 1845 coastline, as Texas contends, or from the coastline as it exists currently or at any time in the future, as the United States contends.

United States v. Louisiana, 394 U.S. 1, 2-3, 22 L. Ed. 2d 36, 89 S. Ct. 768 (1969) (The Texas Boundary Case).

In three cases, the Supreme Court adopted the ambulatory definitions from the Convention on the Territorial Sea and the Contiguous Zone, an international treaty. See *United States v. California, 381 U.S. 139, 165, 14 L. Ed. 2d 296, 85 S. Ct. 1401 (1965)* ("The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act.") (footnote omitted); see also *The Texas Boundary Case, 394 U.S. 1 at 4-6, 89 S. Ct. 768, 22 L. Ed. 2d 36* (stating the same rule); *The Louisiana Boundary Case, 394 U.S. at 35* (stating the same rule) (citation omitted). Pursuant to those decisions, the boundaries of the land (i.e., the location of the land) granted to the states necessarily would change over time. But, that change occurs not because Congress provided a continuing grant of land. Instead, it occurs because Congress defined the boundaries of the granted land using ambulatory terms.

Congress faced no such problem under the Organic Act. The boundary dispute cases thus shed no light on whether Congress intended the Organic Act to constitute a one-time or a continuing grant of land.

Guam also argues that courts have interpreted Section 5(a) of the Submerged Lands Act to provide a continuing grant of land: "Section 5(a) of the Submerged Lands Act, *43 U.S.C. 1313*(a), . . . omits from the grant 'land expressly retained by . . . the United States when the State entered the Union.' Notwithstanding the literal tie to a specific date, this provision has been construed to exempt from transfer land that emerged after statehood and after passage of the Submerged Lands Act."

Guam misconstrues precedent. Courts have held that the United States owns newly emerged land because the Act, *43 U.S.C. § 1313(a)*, expressly retains for the United States "accretions" to its land. See *California ex rel. State Lands Comm'n v. United States, 457 U.S. 273, 283, 73 L. Ed. 2d 1, 102 S. Ct.*

2432 (1982) ("Section 5(a) of the Act [*43 U.S.C. § 1313(a)*], however, withheld from the grant to the States all 'accretions' to coastal lands acquired or reserved by the United States."); *California ex rel. State Lands Comm'n v. United States, 805 F.2d 857, 861 & n.2 (9th Cir. 1986)* (stating a similar proposition). Because Congress expressly reserved future land in the Submerged Lands Act but not in the Organic Act, the former provides no support for Guam's argument that we should imply such a future grant in the latter.

4. Interpretation of a Statute in Favor of Aboriginal Inhabitants

Ordinarily, courts interpret a federal land grant in favor of the United States. See *United States v. Union Pac. R.R. Co., 353 U.S. 112, 116, 1 L. Ed. 2d 693, 77 S. Ct. 685 (1957)*. That rule does not apply, however, when the United States grants land to Native Americans. In those circumstances, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269, 116 L. Ed. 2d 687, 112 S. Ct. 683 (1992)* (citation and internal quotation marks omitted).

Guam argues that this principle applies equally to the native inhabitants of Guam and, thus, requires us to interpret the statute in its favor. Assuming, without deciding, that the rule applies here, it does not assist Guam. "The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506, 90 L. Ed. 2d 490, 106 S. Ct. 2039 (1986)*. The Organic Act unambiguously demonstrates Congress' intent to provide a one-time grant of property. This interpretative aid cannot defeat that unambiguously expressed intent.

5. Guam Land Transfer Act and Guam Land Acquisition Act

Guam next argues that we must read the Organic Act in the light of the Guam Land Transfer Act of 1945, which allows for the sale of land that is no longer required for a military purpose:

> That for the purpose of effecting the rehabilitation and resettlement of the residents of Guam, the Secretary of the Navy, or such officer as he may designate for such purpose and under such regulations as he may prescribe, is hereby authorized to transfer to the naval government of Guam, for transfer or sale by the naval government of Guam at its discretion, to such persons and upon such terms and conditions and at such times as it may determine to be suitable, in replacement of lands acquired for military or naval purposes in Guam, such lands owned by the United States in Guam as may be determined by the Secretary of the Navy, after consultation with the Secretary of War, not to be required for military or naval purposes.

Guam Land Transfer Act, Pub. L. No. 225, 59 Stat. 584 (1945). That Act expressly authorized the transfer of land "not . . . required for military or naval purposes." Congress chose not to include similar wording in the Organic Act. In the circumstances, we must give effect to the different wording. See *Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1177 (9th Cir. 1999)* ("We must give effect to the different wording and different focus of the two provisions.").

Guam also attempts to rely on the Guam Land Acquisition Act of 1946, Pub. L. No. 594, 60 Stat. 803 (1946). However, that Act pertains to acquisition, not transfer, of land. That being so, the Act sheds no light on the meaning of the land-transfer provisions in the Organic Act.

6. Defeat of the Obvious Intent of Congress

Finally, Guam argues that interpreting the statute as a one-time grant would defeat the obvious intent of Congress. "In all cases of statutory construction, the plain meaning of legislation

should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *California Central Trust Bankcorp v. Been (In re Been), 153 F.3d 1034, 1036 (9th Cir. 1998)* (citation and internal quotation marks omitted). See also *Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982)* ("In rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."). This is not one of those "rare" cases.

After the United States recaptured Guam from Japan, the United States acquired many acres of land for use by the military. However, by the late 1940s, the military was no longer using much of that land; by 1950, more than 50 percent of the actual acreage in Guam was occupied by inactive military installations. See Civil Gov't of Guam: Hearing on S. 185, S. 1892 & H.R. 7273 Before a Senate Subcomm. of the Comm. on Interior and Insular Affairs, 81st Cong. 62, 2d Sess. (Apr. 19, 1950). As noted above, Congress previously had enacted the Guam Land Transfer Act to allow for the release of some of this land. Congress expressed a similar purpose when drafting the Organic Act:

> The committee recommends that the need of the military for the land now held by it should be carefully reexamined, with the object of releasing at the first possible moment all lands not actually required for military purposes.

H.R. Rep. No. 81-1677, at 11 (1950).

> That the armed forces immediately resurvey their military needs for lands throughout the Trust Territory, and in Guam and American Samoa, so that all land not absolutely required for military purposes may be returned to private ownership and use.

Hearing on H.R. 4499 Before the Senate Comm. on Interior and Insular Affairs, 81st Cong. 20, Exec. Sess. (Jan. 30, 1950).[5] Guam argues that interpreting the Organic Act as a one-time grant would defeat that obvious purpose, because the President reserved all or almost all the property subject to § 28(b). Thus, Guam reasons, unless § 28(b) imposes a continuing grant of property, it was an "empty promise to the Guamanian people."

Guam's argument is premised on its belief that the sole purpose of § 28(b) was to transfer control of property to the Guamanian government. However, Congress knew how to create such a transfer provision if it had that intent: Subsection (a) unconditionally transferred all property owned by the United States that the naval government of Guam had used "in the administration of the civil affairs of the inhabitants." See also Guam Land Transfer Act, 59 Stat. 584 (authorizing Congress to transfer land when no longer required for military purposes). Congress used different wording in subsection (b).

The wording of subsection (b) instead suggests that Congress' purpose was to force the President to decide promptly and affirmatively whether to retain property. That interpretation is equally supported by the legislative history, which demonstrates Congress' frustration that the military had not yet released land that even it believed was unnecessary. See, e.g., Civil Gov't of Guam, at 37 ("I am going to ask the Governor now, have they returned that 26,000 acres that the military agrees it does not need and which we in Public Lands were told 2 years ago that the military did not need . . . ?"). If Congress' purpose was to require the President affirmatively and promptly to reserve land that he believed that the federal government still needed, then that purpose was accomplished, even though the President decided to reserve all or almost all the land subject to § 28(b). Guam has not established an "obvious" purpose that the plain wording of the statute will defeat.

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[5] Both passages from the legislative history, as well as the Land Transfer Act, refer to Congress' desire to return unneeded land to private use in Guam. They do not necessarily suggest that Congress intended to give such property to the territorial government of Guam.

D. Conclusion

We hold that Congress unambiguously intended for § 28(b) to provide Guam with a one-time grant of property. The district court did not err by granting summary judgment to the United States on Guam's first claim.

TERRITORIAL SUBMERGED LANDS ACT

Guam also claims that it is entitled to submerged land adjacent to the land discussed above. However, Guam acknowledges that it cannot prevail on its claim for submerged land unless it prevails on its claim under the Organic Act. Because we hold that Guam is not entitled to any land under the Organic Act, we also hold that it is not entitled to any submerged land adjacent to that property.

ABORIGINAL TITLE

Finally, Guam claims that it is entitled to control some of the land at issue under the doctrine of "aboriginal title." The district court refused to decide whether that doctrine applies to the native inhabitants of Guam, holding instead that the doctrine would not entitle Guam to the relief that it seeks. Because we agree with the district court, we also assume, without deciding, that the doctrine of aboriginal title applies to the native inhabitants of Guam.

"Aboriginal title refers to the right of original inhabitants of the United States to use and occupy their aboriginal territory." *Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334, 341 (9th Cir. 1996).* Accordingly, the right to aboriginal title belongs only to tribes and, in some circumstances, to individual members of tribes. See *United States v. Dann, 873 F.2d 1189, 1195-96 (9th Cir. 1989)* ("The common view of aboriginal title is that it is held by tribes. . . . Nevertheless, the Supreme Court has . . . recognized that individual aboriginal rights may exist in certain contexts.") (citation and internal quotation marks omitted); see also William C. Canby, Jr., American Indian Law, pp. 347-48 (3d ed. 1998) (stating a similar proposition).

The government of Guam is neither a tribe nor a tribal member. Therefore, the government of Guam qua government cannot claim any aboriginal right to use or occupy tribal land.

Guam argues in response that it has a right to control the land as a trustee for the aboriginal inhabitants of Guam. The Constitution, however, gives Congress that power:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign - first the discovering European nation and later the original States and the United States - a right of occupancy in the Indian tribes was nevertheless recognized. . . . Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law.

Oneida Indian Nation of N.Y. State v. County of Oneida, 414 U.S. 661, 667, 39 L. Ed. 2d 73, 94 S. Ct. 772 (1974). See also *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 276, 86 L. Ed. 2d 168, 105 S. Ct. 2587 (1985)* ("The Constitution grants Congress . . . the power to set national policy respecting Indian lands . . . .").

Congress can delegate its authority over aboriginal land rights. See *Turtle Mountain Band of Chippewa Indians v. United States, 203 Ct. Cl. 426, 490 F.2d 935, 945 (Ct. Cl. 1975).* Guam argues that the Organic Act constitutes such a delegation. As noted above, however, the Organic Act delegates authority over the property at issue to the executive branch of the federal government, not to the territorial government of Guam. To the extent that Congress intended to delegate its trust authority over aboriginal rights to that land, Congress did not delegate its authority to the territorial government of Guam.

In this connection, Guam also relies on the Land Transfer Act of 1945. That Act allowed the United States naval government, not the territorial government, to transfer or sell property for the "resettlement of the residents of Guam." See Pub. L. No. 225, 59 Stat. 584 (1945). Nothing in that Act suggests an intention to delegate trust responsibility to the territorial government of Guam.

In summary, Guam has not demonstrated that Congress delegated its authority over aboriginal land rights to the territorial government. Guam has cited no precedent allowing a governmental body to compel Congress to make such a delegation. In the circumstances, the district court did not err by holding that Guam's claim to aboriginal title would not entitle it to any relief.

AFFIRMED.

APPENDIX C

THE GOVERNMENT OF GUAM, et al.

v.

UNITED STATES OF AMERICA, et al.

Case No. CV 95-00111

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

JUDGMENT

October 22, 1997, Filed

In accordance with the findings and conclusions within this Court's July 16, 1997 Order, it is

ORDERED that the defendants are entitled to summary judgment with respect to each and every claim raised by plaintiff in its Amended Complaint. Further it is

ORDERED, DECREED AND ADJUDGED that the defendant retain title to all lands at issue in the above-captioned case;

Finally, it is

ORDERED and **ADJUDGED** that this civil action shall be, and it is hereby, **DISMISSED** with prejudice, each party to bear their own costs.

Dated: October 22, 1997.

/s/John S. Unpingco
JOHN S. UNPINGCO
District Judge

APPENDIX D

THE GOVERNMENT OF GUAM, et al.

v.

UNITED STATES OF AMERICA, et al.

Case No. CV 95-00111

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

MEMORANDUM ORDER ON MOTION FOR RECONSIDERATION

August 29, 1997, Filed

This matter is before this Court on the Plaintiff Government of Guam's, et al. ("GOVGUAM") Motion for Reconsideration. This Court has reviewed GOVGUAM's Memoranda, the cases GOVGUAM cites in support and this Court's July 17, 1997 Memorandum Order. Based on this review this Court finds that reconsideration of the two issues presented is not warranted. Accordingly, GOVGUAM's Motion for Reconsideration is DENIED. This determination is based on the Court's finding that the two issues presented for reconsideration were: (1) considered by the Court in its prior order and (2) not material to the final resolution of issues presented by this case. Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985)

GOVGUAM requests this Court reconsider its July 16, 1997 Memorandum Order granting summary judgment in favor of the United States. LR 7.1(i)(3) ("A motion for reconsideration of the decision on any motion may be made only on the grounds of a manifest showing of a failure to consider material facts presented to the Court before such a decision."); see also Fed.R.Civ.P. 59(e); Fed.R.Civ.P. 60(b). GOVGUAM bases this motion on its position that this Court "failed to consider and decide the following two

issues presented by the pleadings, briefs and parties arguments: (1) Whether unextinguished aboriginal title attaches to some 2,200 acres in suit, and if so whether possession and control of these parcels, no longer needed for military purposes, must now be transferred to the Government of Guam as representative of the aboriginal owners; and (2) Whether a special fiduciary relationship subsists between the United States and the native people of Guam, and if so, whether the attendant cannon of construction requires reading § 28(b) of the Guam Organic Act as imposing an obligation to transfer the lands in suit to the Government of Guam, now that they are no longer needed for Military purposes." GOVGUAM et al. v. United States et al., District Court of Guam, CV 95-00111, GOVGUAM's Motion for Reconsideration filed July 25, 1997.

ABORIGINAL TITLE CLAIMS

As to the claim that this Court failed to evaluate GOVGUAM's argument regarding Aboriginal Title this Court disagrees. At pages 14-15 of the July 16, 1997 Memorandum Order this issue was addressed; this Order stated the Court's determination that this issue as presented was not justiciable. Accordingly, this Court's Memorandum Order, on its face, clearly demonstrates its evaluation of this issue. Nothing in GOVGUAM's Motion to Reconsider alters this Court's evaluation of this finding.

It is the Court's position that, assuming arguendo, the doctrine of aboriginal title applied this determination alone is insufficient to provide the relief requested - a determination that the federal government has a mandatory obligation to release and transfer these lands to GOVGUAM. Local No. 8-6 Oil Chemical and Atomic Workers etc. v. Missouri, 361 U.S. 363, 367 (1960) (stating the general rule that a federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it). Quite simply, as this issue has been presented a holding one way or the other on the question of aboriginal title would have no effect on the outcome of this particular case. Defendant United States, as title holder or trustee, would not be required to transfer any lands to GOVGUAM as a substitute trustee. Accordingly, any

determination regarding aboriginal title on these facts would be an advisory opinion only; as such opinions are to be avoided this Court declines to rule on this matter in this case.

EXISTENCE OF GENERAL FIDUCIARY OBLIGATION

Second, GOVGUAM seeks reconsideration of this Court's July 16, 1997 Memorandum Order as to the existence of a special fiduciary relationship. In its original motion papers GOVGUAM contended that a special fiduciary relationship – analogous to that of the United States and the tribes of Native Americans – exists between the United States and the Chamorro race. In its Motion for Reconsideration GOVGUAM argues that this Court failed to "consider and decide" this issue. This Court did not decide this issue. However, a full reading of the Court's reasoning discloses the inapplicability of this argument in this case.

GOVGUAM admits that the purpose behind its raising this fiduciary relationship argument is an effort to make a specific statutory canon of construction[6] applicable to its case. GOVGUAM admitted that in and of itself "the existence of a fiduciary relationship does not . . . command the relinquishment" of excess military lands. GOVGUAM et al. v. United States et al., District Court of Guam, CV 95-00111, GOVGUAM's Opening Memorandum in Opposition filed June 6, 1997, at p. 38. This issue was not presented to directly support its claim of a mandatory duty to transfer lands. Rather, this issue was raised in order to support GOVGUAM's application of a specific "canon of construction requiring the resolution of ambiguities in favor of the native claim." Id. Furthermore, GOVGUAM argued: "Of course, there must be an ambiguity in the text before the rule can operate." Id. at 39.

Based on the presentation of this argument this Court found that an initial or preliminary finding of statutory ambiguity was required to place this fiduciary relationship argument at issue. As this Court unequivocally found that section 28(b) of the Organic Act was clear and unambiguous the issue of the existence of this special fiduciary relationship was foreclosed. GOVGUAM et

[6] The canon of construction advanced by GOVGUAM is one which requires resolution of any statutory ambiguity in favor of the native American claim.

al. v. United States et al., District Court of Guam, CV 95-00111, Memorandum Order filed July 16, 1997, at pp. 16-32. Therefore, to rule on this issue, after making a determination that the statute is unambiguous, would, like the previous issue, be mere dicta and immaterial to the final outcome.

In sum, despite GOVGUAM's contention that its motion is based on this Court's failure to consider material issues in granting summary judgment for the United States, the issues identified by GOVGUAM in its motion were either expressly considered by this Court's prior order or immaterial to the summary judgment decision. GOVGUAM's lawsuit sought to establish the existence of a mandatory duty on the part of the United States to transfer federal lands no longer needed for military purposes to GOVGUAM. That GOVGUAM disagrees with this Court's determination is expected. However, this disagreement alone does not entitle it to seek reconsideration of claims that have been considered and ruled upon by this Court. Accordingly, the Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the United States shall, as to this causes of action, prepare and submit the appropriate judgment, stipulated as to form by all parties, in accordance with the findings and conclusions within this Court's July 16, 1997 Order. See generally Fed.R.Civ.P. 54; L.R. 54.1. This Proposed Judgment shall be filed no later than September 5, 1997.

Dated: August 28, 1997.

/s/John S. Unpingco
JOHN S. UNPINGCO
District Judge

APPENDIX E

THE GOVERNMENT OF GUAM, et al.,

v.

UNITED STATES OF AMERICA, et al.

Case No. CV 95-00111

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

MEMORANDUM ORDER

July 16, 1997, Filed

This matter is before this Court of the Defendant United States', et al. ("United States") Motion for Summary Judgment and Plaintiff Government of Guam's, et al. ("GOVGUAM") Cross-Motion for Summary Judgment. This Court has reviewed the parties submitted papers/exhibits, the controlling legal authority and considered the parties arguments put forth at the motion hearing. For the reasons that follow the United States' Motion for Summary Judgment is GRANTED and GOVGUAM's Cross-Motion for Summary Judgment is DENIED.

A. BACKGROUND

GOVGUAM filed the above-captioned case in an effort to establish the existence of a statutory, mandatory duty on the part of the United States to transfer federal lands no longer needed for military purposes to GOVGUAM. The cornerstone of GOVGUAM's argument is its proposed interpretation of section 28(b) (codified at 48 U.S.C. § 1421f(b)) of the Organic Act of Guam ("Organic Act"). It is this question of statutory construction which is the subject of these motions.

The Government of Guam's argument is based on its belief that the 81st Congress, in drafting section 28(b) of the Organic Act, intended to create a clear, continuous and mandatory duty to transfer (hereinafter "Duty to Transfer") federal lands to GOVGUAM once these lands were determined to be in excess of military needs. The United States counters with the contention that GOVGUAM's interpretation is erroneous. The United States counters that the plain text of the Organic Act demonstrates that the purpose of section 28(b) was the creation of a one-time, discretionary transfer which expired 90 days after the Organic Act became law.

Guam was ceded to the United States by Spain in 1898 at the end of the Spanish-American War. Following this acquisition, the United States governed Guam under the administration of the Department of the Navy, with the exception of the Japanese occupation (December 1941 – July 1944) until 1950. In 1950, a civil government was established with the passage of the Organic Act of Guam, ch. 512, 64 Stat. 384 (1950)(codified as amended at 48 U.S.C. §§ 1421-1424c). The Organic Act established Guam as an unincorporated territory of the United States. The Act's purpose was the creation of a civilian territorial government. Since 1950, the Organic Act has been amended on several occasions; however, it remains the functional equivalent of a constitution for Guam, operating as an outline for the scope of the territorial government's legal authority. Agana Bay Development Company (Hong Kong) Ltd. v. Supreme Court of Guam, 529 F.2d 952, 954 (9th Cir. 1976).

In addition to these background facts, the Court accepts as true the parties' stipulated facts submitted to the Court on June 13, 1996 (Docket #49). GOVGUAM v. United States, District Court of Guam, CV 95-00111, Parties' Stipulated Facts ("Stipulation"). While a number of these facts are not dispositive as to the dispute in this case they are helpful in defining the issues presented by this case.

The joint stipulation evidences that the federal government has possession of these lands. Stipulation at paragraphs 11-29. These lands have come into the possession of the United States through a series of statutory reservations and condemnation cases. Id. Paragraphs 11 through 41 describe the statutory and condemnation processes through which the United States obtained possession of

these lands. Moreover, this joint stipulation outlines the history of the United States' attempt to provide Guam's land owners with the opportunity to present compensation claims for federal land takings. Stipulation, at paragraphs 11-41. The parties affirm that: "all persons whose lands were acquired between July 21, 1994 (Liberation Day) and August 23, 1963, were afforded jurisdiction to pursue claims for 'fair compensation' if they alleged that they had received less than fair market value as a result of 'unfair, unjust, and inequitable actions of the United States.'" Stipulation, at paragraph 35. The parties also agree that since 1977 the United States has paid over forty-two million dollars in additional compensation to former land owners or their heirs for lands acquired by the United States between June 21, 1994 and August 23, 1964. Stipulation, at paragraphs 35-41.

These factual stipulations also clarify the specific nature of the legal dispute in this case. Based on an objective reading of this joint stipulation, it is clear that GOVGUAM's present lawsuit does not seek federal lands through any claim to superior legal title. Moreover, GOVGUAM does not object to the United States' past actions under eminent domain or the reasonableness of the compensation paid for these lands. This case, unlike past Guam "land cases," does not present claims of inequitable or unconstitutional government takings. Rather this dispute narrowly focuses on whether the United States, through the Organic Act of 1950, obligated itself to transfer federal lands to the Government of Guam after such lands are no longer needed for military or national security purposes.

Among the provisions of the Organic Act of 1950 was section 28. This section was drafted with three subsections: § 28(a), (b) and (c). Section 28(a) of the Organic Act, 48 U.S.C. § 1421f(a), directed the United States (Naval Government of Guam) to transfer to the new government of Guam, within ninety days of the Act's enactment, all property owned by the United States and used by the Naval Government of Guam in the administration of the civil affairs of the inhabitants of Guam. Section 28(b), 48 U.S.C. § 1421f(b), provided that the control of all other property owned by the United States in Guam was to be transferred to the administration of the new civilian government of Guam. However, this "other property" transfer was conditional; subsection (b) expressly provided the means for the federal

government, within the discretion of the Executive Branch, to exempt any "other property" from this subsection (b) transfer. And lastly, section 28(c), 48 U.S.C. § 1421f(c), sets out a provision transferring the administrative supervision of federal lands on Guam from the former Naval Government of Guam to a specified federal agency. Accordingly, property reserved by the President was to be retained, controlled and administered by the United States. 48 U.S.C. § 1421f(c).

On October 31, 1950, the President issued Executive Order No. 10178, 15 Fed.Reg. 7313 (1950), reprinted in 48 U.S.C. § 1421f app. at 1358-59, reserving the lands in question to the United States, to be administered by the Secretary of the Navy. The Executive Order listed the various properties by acreage, common description, and other particulars. The Executive Order also recited that it was being used pursuant to section 28 of the Organic Act of Guam, and that these were the same parcels which had been quitclaimed by the Naval Government of Guam to the United States.

Between 1986 and 1994, as a result of a series of Department of Defense reviews (including the 1986 "Army Report" and GLUP 94), the United States has determined that certain federal lands on Guam, previously reserved for military purposes, were now "excess" to military needs. These excess lands have been, or are currently being, administered and redistributed by the General Services Administration ("GSA"), pursuant to the Federal Property Act.

Now, close to fifty years after section 28(b) was drafted, GOVGUAM claims that property reserved by the President under section 28(b), which has subsequently become unneeded for military purposes, must be transferred to the government of Guam under an alleged continuing mandate of section 28(b). These former military lands, contend GOVGUAM, are being unlawfully retained by the United States.

In 1995, the Guam Economic Development Authority ("GEDA") filed an action on behalf of GOVGUAM claiming that the United States decision to transfer these lands to USFWS is improper under the Organic Act. The suit alleged that the federal lands in question, once determined that they are no longer needed for military purposes, must be transferred to GOVGUAM under § 28(b) of the Organic Act. GOVGUAM argues, inter alia, based

on its interpretation of Section 28 of the Organic Act (read in the context of history, the Land Transfer Act of 1945, Land Acquisition Act of 1946, Territorial Submerged Lands Act, Fiduciary Duty and the Doctrine of Aboriginal Title) that the United States has a mandatory obligation to turn over to GOVGUAM real property found to be unneeded for military purposes. Specifically, GOVGUAM has, under this legal theory, pled three separate claims:

(1) The first claim for relief is Plaintiff GOVGUAM's challenge of the United States ownership of 371 acres of land, comprised of beach and cliff parcels, located on the northern tip of Ritidian Point. This land is currently held by the United States Fish and Wildlife Service.

(2) The second claim for relief is Plaintiff GOVGUAM's challenge of the United States ownership of 15,571 acres of land, comprised of submerged lands adjacent to the Ritidian Point Uplands described in the First Claim. This land is currently held by the General Services Administration.

(3) The third claim for relief is Plaintiff GOVGUAM's challenge of the United States ownership of 3,553 acres of U.S. Air Force land, comprised of lands adjacent to the Ritidian Point Uplands described in their first claim. This land is currently held by the Air Force, but has been listed as releasable in the Department of Defense 1994 Guam Land Use Plan ("GLUP 94").

B. SUMMARY JUDGMENT STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment:

> . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Summary judgment is only appropriate if, under the governing law, there can be but one reasonable conclusion as to the verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

In evaluating a Rule 56 motion, courts must view the evidence in the light most favorable to the non-moving party; if direct evidence as to material facts conflicts, summary judgment must be denied. Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). A material fact is one that is relevant to the claim or defense at issue and will affect the outcome of the suit; disputes over unnecessary immaterial facts will not preclude summary judgment. Anderson, 477 U.S. at 248. The initial burden, under Rule 56, belongs to the moving party to establish (by identifying these materials on file that demonstrate) the absence of any genuine issue of material fact. Celotex, 477 U.S. at 331-332. Then the burden shifts to the non-moving party, who "must do more than simply show that there is some metaphysical doubt as to the material facts." Anderson, 477 U.S. at 248. Where the moving party meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact, the non-moving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment -- the burden of persuasion shifts to the non-moving party. First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 290, n.19 (1968). "The moving party is 'entitled to a judgment as a mater of law' [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex, 477 U.S. at 323.

Consequently, in opposing a summary judgment motion the nonmoving party must, after the moving party has made a prima facie showing of entitlement to summary judgment, come forward with competent evidence through which a jury could find in her favor. Id. The non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." Id.

Additionally, the non-moving party must support the existence of specific factual showings with references to the record. Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988). In short, diligence in opposing a summary judgment motion is required. Southern Rambler Sales, Inc. v. American Motors Corp., 375 F.2d 932, 937 (5th Cir. 1967).

C. ANALYSIS

There is no dispute that the issue brought by these cross-motions is the interpretation of section 28(b) of the Organic Act: whether the Act created a mandatory, continuing obligation on the part of the United States to transfer federal lands no longer necessary for military purposes to GOVGUAM. This determination is clearly a matter of statutory construction. Accordingly as it is well-recognized that statutory interpretation is a question of law, Van Der Salm Bulb Farms, Inc. v. Hapag, 818 F.2d 699 (9th Cir. 1987), citing, Trustees of Amalgamated Ins. Fund v. Geltman Ind., 784 F.2d 926, 929 (9th Cir. 1986) and Schlothan v. Territory of Alaska, 276 F.2d 806, 815 (9th Cir. 1960), this dispute can properly be resolved by summary judgment. However, before this Court may address the merits of the parties' positions, it must first determine the issue of whether this Court has jurisdiction to resolve this dispute.

1. Jurisdiction

As a threshold matter, the parties are in dispute regarding the jurisdiction by which this matter is before the Court. GOVGUAM claims that this action is a straightforward federal question case; further asserting that under this statutory jurisdiction it brings two alternative causes of action: (1) declaratory judgment (28 U.S.C. § 2201) and (2) writ of mandamus (28 U.S.C. § 1361). GOVGUAM states that it does not contest the United States legal title to the lands in dispute, rather it only seeks a legal interpretation of the United States' duty to transfer. On the other hand, the United States contends that GOVGUAM's claims place the United States' interest in the land in dispute and such claims are only cognizable under the Quiet Title Act (28 U.S.C. § 2409a).

Furthermore, pursuant to the 12-year statute of limitations set forth in § 2409a(f), GOVGUAM's claims are now barred. For the reasons that follow this Court finds that jurisdiction is proper under either 28 U.S.C. § 1331 or 28 U.S.C. § 2409a.

(a) DECLARATORY JUDGMENT and WRIT OF MANDAMUS

GOVGUAM contends that this Court has jurisdiction to review this matter under 28 U.S.C. § 1331, general federal question jurisdiction. As evaluated below, GOVGUAM argues that: (1) jurisdiction is proper under 28 U.S.C. § 1331; (2) a cause of action for declaratory judgment (28 U.S.C. § 2201) has been stated, to resolve a controversy arising under the Organic Act of Guam, 48 U.S.C. § 1421f; and (3) the United States has waived sovereign immunity pursuant to 5 U.S.C. § 702.

An examination of the complaint demonstrates that the issue presented in this case is the interpretation of a federal statute – section 28(b) of the Organic Act. A claim based on an alleged violation of, or a dispute over, the effect of a federal statute is a claim arising under federal law within the meaning of section 1331. Guinasso v. Pacific First Federal Sav. And Loan Ass'n, 656 F.2d 1364, 1365-66 (9th Cir. 1981) (holding that section 1331, federal question jurisdiction is triggered where the complaint presents a substantial dispute over the effect of federal law), citing, Spokane County Legal Services Inc. v. Legal Services Corp., 614 F.2d 662, 667 (9th Cir. 1980), Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 249 (9th Cir. 1974). Therefore, as the dispute in this case involves the interpretation of federal law and "arises under the . . . laws . . . of the United States," pursuant to section 1331, this Court has subject-matter jurisdiction. 28 U.S.C. § 1331.

Next GOVGUAM asserts that the actual causes of action are founded on the two different remedies requested: (1) a writ of mandamus (28 U.S.C. § 1361) and (2) declaratory relief (28 U.S.C. § 2201). As to the mandamus action, GOVGUAM concedes that the mandamus cannot lie if this Court finds in its interpretation of Section 28(b) that the United States does not have a clear statutory duty to transfer. Nevertheless, posits the plaintiff, this Court certainly has the authority and jurisdiction under

section 1361 to make the threshold determination regarding whether the United States owes a clear duty. Piledrivers' Local Union No. 2375 v. Smith, 695 F.2d 390, 392 (9th Cir. 1981). This Court agrees.

Furthermore, despite the interesting and complex issues raised in evaluating the propriety of mandamus relief, such argument in this case is immaterial. This conclusion is based on the fact that GOVGUAM's complaint pled an alternative cause of action under the Declaratory Judgment Act. Under this theory, this Court is authorized to "declare the rights and other legal relations of any interested party seeking such a declaration . . . in a case of actual controversy within its jurisdiction." The equitable remedy of declaratory judgment and injunction is available to GOVGUAM, independent of mandamus.

Lastly, sovereign immunity is waived pursuant to 5 U.S.C. § 702. Assiniboine and Sioux Tribes v. Board of Oil and Gas, 792 F.2d 782, 792-793 (9th Cir. 1986) (reaffirming the broad scope of the § 702 waiver of sovereign immunity defense in non-monetary relief cases brought under general federal question jurisdiction), citing, Rowe v. United States, 633 F.2d 799, 801 (9th Cir. 1980) (§ 702 waiver of statutory immunity has broad effect and provide waiver for actions brought under section 1331; § 702 abolish sovereign immunity in actions for "relief other than money damages").

GOVGUAM's jurisdictional analysis is sound and this Court concurs that it has jurisdiction to entertain this matter. Yet, GOVGUAM's position, and the clear legal framework which supports its argument, avoids the issue of whether this action is required to be pled under the exclusive jurisdiction of the Quiet Title Act. As set forth below, this Court finds that this lawsuit is governed by the Quiet Title Act.

(b) The Quiet Title Act

The United States contends that GOVGUAM's reliance on standard federal question jurisdiction is contrived and erroneous. Defendant argues that despite GOVGUAM's "artful pleading" this dispute concerns more than a statutory interpretation of future rights, it is a direct challenge to the United States' present interest in real property. Accordingly, under the broad and exclusive

interpretations of the Quiet Title Act (28 U.S.C. § 2409a) this action must be pursued under this statute, and, because GOVGUAM's complaint was filed outside the Act's twelve-year limitations period, there is no jurisdictional basis upon which this Court may proceed. Block v. North Dakota, 461 U.S. 273, 286 (1983) ("We hold that Congress intended the Quiet Title Act to provide the exclusive means by which adverse claimants could challenge the United States' title to real property.").

In support of this position the United States correctly asserts that plaintiffs may not "artfully plead" themselves outside the contours of the Quiet Title Act. Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982) (court looks to the essence of the complaint/action to determine if action is, in reality, a Quiet Title Action); McClellan v. Kimball, 623 F.2d 83, 85-86 (9th Cir. 1980); see also Block, 461 U.S. at 286 ("it would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.") GOVGUAM responds that it does not seek a declaration as to legal title or land ownership, but only a declaration of its entitlement under § 1421f(b) to these lands.

The United States' assertion that this lawsuit is really an action to determine the ownership interests of real property on Guam is persuasive. This Court agrees the provisions of the Quiet Title Act cannot be circumvented by drawing distinctions between a present (pre-lawsuit) interest and a future (post-lawsuit) interest. See generally GOVGUAM Opening Memoranda at 6. In this case, GOVGUAM's claim requests a declaration/interpretation as to the United States duty to transfer land under 1421f(b). The outcome of this case will directly impact the United States' title and interest in real property. The practical consequence of the declaratory judgment requested is the determination of whether the United States retains, or GOVGUAM gains, legal title and interest to these lands. The fact that GOVGUAM's theory of the case is founded on an alleged statutory "duty to transfer" does not remove this dispute from the ambit of the Quiet Title Act. Quite simply, this lawsuit is a dispute over land ownership. GOVGUAM's lawsuit must stand or fall under the Quiet Title Act.

The Quiet Title Act provides a limited waiver of the sovereign immunity of the United States. It permits the United States to be

named as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a). Such an action, however, "shall be barred unless it is commenced within twelve years after the date upon which it accrued." 28 U.S.C. § 2409a(g)[7]. As this limitations period is a condition on the waiver of sovereign immunity, the Court's jurisdiction depends upon timely filing. Block, 461 U.S. at 282-83. It is the United States' position that GOVGUAM's claims are barred by § 2409a(g), the Quiet Title Act 12-year statute of limitations.

Quiet title actions under the statute are deemed to accrue on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States. 28 U.S.C. § 2409a(g). GOVGUAM filed this case on September 22, 1995. The United States argues that GOVGUAM's action is barred because "[t]he United States has held fee title to the lands at issue since at least 1962, thirty-three years prior to the filing of this suit." United States Opening Memorandum at 37. While this fact is true, and uncontested by GOVGUAM, this does not end the inquiry.

GOVGUAM does not deny that it has known of the federal government's title to these lands in excess of twelve years. However, in evaluating whether a plaintiff "knew or should of known of the claim of the United States" it must be shown that the plaintiff knew the United States' claim was contrary or adverse to the plaintiff's claimed interest. Michel v. United States, 65 F.3d 130, 132 (9th Cir. 1995), citing, Fadem v. United States, 52 F.3d 202, 207 (9th Cir. 1995). Plaintiff's mere knowledge that the United States claimed title is not always sufficient to trigger the running of limitations period. Id. If the United States claim to title were all that was needed to trigger the running of the limitations period on any claim affecting use of the property, a claimant of a future interest of right of access would be forced to bring suit within twelve years even though the United States has provided no indication that it contested the claimant's right. The

[7] 28 U.S.C. § 2409a(g) states: "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it is accrued. Such action shall be deemed to have accrued on the date the plaintiff knew or should have known of the claim of the United States."

claimant would be compelled to sue to protect against the possibility, however remote, that the United States might someday deny claimant his alleged interest. The Quiet Title Act should not be read in a manner that would create premature and unnecessary lawsuits. Michel, 65 F.3d at 132 ("A contrary holding would create a lead to premature, and often unnecessary, suits.")

In this case, based on an unpredictable set of circumstances, GOVGUAM argues, under its section 28(b) "duty to transfer" theory, that it has a statutory entitlement to control the lands in question following the United States' determination that section 28(b) lands are no longer essential for military purposes. GOVGUAM has presented evidence which supports its position that this determination occurred no earlier than the 1986-1994 period. See generally Parties' Stipulated Facts paragraphs 47-64. This Court concurs. Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. at 586-87 (stating that in the evaluation of Rule 56 motions courts must view the evidence in the light most favorable to the non-moving party).

Prior to this action GOVGUAM had no notice that the United States' possession of these lands for military purposes was adverse to its perceived section 28(b) future interest. See also Michel, 65 F.3d at 132 n.1 (suggesting that the Quiet Title Act's limitations period commences from the time the government attempts to restrict benefits the plaintiffs previously enjoyed with respect to government property, rather than from the time plaintiffs knew of the government's title). Through this analysis it can be argued that GOVGUAM's section 28(b) based claim did not accrue until some time between 1986 to 1994. Consequently, based on the specific circumstances of this case and the pressing need to directly address the substantive issues presented by GOVGUAM in this case, the Court will give the benefit of the doubt to GOVGUAM.

Thus, under either jurisdictional theory put forward, (standard federal question (28 U.S.C. § 1331) or Quiet Title Act 28 U.S.C. § 2409a) this Court has the power and authority to entertain this case. Accordingly, this decision will now examine the merits of the case.

2. Substantive Analysis

Both the United States and GOVGUAM have presented this Court with comprehensive legal memoranda and factual records. However, after a careful examination of the extensive legal briefs, supporting memoranda and the seemingly unending binders of factual exhibits, the issue presented for review boils down to straightforward statutory interpretation: Does section 28(b) of the Organic Act create a continuing, mandatory duty to transfer, to the Government of Guam, all federal lands no longer needed for military purposes? As stated above, this duty to transfer theory arises from GOVGUAM's interpretation that section 28(b) of the Organic Act and the doctrine of aboriginal title establish this duty to transfer.

(a) The Doctrine of Aboriginal Title

Plaintiff GOVGUAM argues, as to certain lots, that a legal claim of possession exists under a theory of aboriginal title. See generally GOVGUAM's Opening Memorandum at pp. 15-16. This Court has carefully considered GOVGUAM's "aboriginal title" argument and the extensive support it includes in its memoranda. Yet, despite the interesting legal and historical analysis presented, the Court declines to rule, based on the specific issue presented in this case, on whether this doctrine applies to Guam or to the Chamorro people. This issue is immaterial to the particular question presented in this lawsuit: whether a statutory, mandatory "duty to transfer" federal lands exists. This determination is supported by the following findings.

First, assuming arguendo that both the doctrine of aboriginal title applied to these lands and that GOVGUAM, rather than the federal government, is somehow the more suitable trustee, this theory fails to support a finding of "mandatory" transfer. GOVGUAM concedes that the application of aboriginal title does not create the mandatory duty to transfer federal lands it seeks. See GOVGUAM Opening Memorandum at pages 16-17 (acknowledging that any claim to federal lands based on "aboriginal title" does not mandate a present duty to transfer land; furthermore, the United States decision to modify land use from military to non-military purposes does not trigger such a duty);

see also GOVGUAM Opening Memorandum at page 38 and GOVGUAM Reply Memorandum at pages 8-9 (acknowledging the same with reference to any claim based on "fiduciary relationship"). Therefore, a judicial determination of the applicability or validity of this doctrine to Guam and the Chamorro people, in this particular case, is irrelevant and unnecessary.

GOVGUAM presents this claim while admitting that it does not create the mandatory duty to transfer it seeks to establish. It is presented, argues the plaintiff, merely to support its position that the United States does not have "exclusive control" of these lands. As well, it is put forth in an effort to demonstrate its position that the United States has some ethical duty to transfer control of these lands to the local government. See GOVGUAM Opening Memoranda at pp 16-17. But regardless of its proposed application, this doctrine simply does not assist in the resolution of the specific legal/statutory dispute presented here. Rather this argument appears suspiciously like a request for an advisory opinion which this Court is powerless to render. U.S. Const. art. III, § 2 (requiring a justiciable case or controversy as opposed to an abstract or hypothetical matter); see generally FCC v. Pacifica Foundation, 438 U.S. 726, 735, reh. denied, 439 U.S. 883 (1978); Paschall v. Christie-Stewart, Inc., 414 U.S. 100, 101-02 (1973); Golden v. Zwickler, 394 U.S. 103, 108 (1969); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-41 (1937). Accordingly, as the outcome of the case is the same whether the Court accepts or rejects this Aboriginal Title claim, the Court finds that a determination of this issue is unnecessary.

(b) Statutory Interpretation of 42 U.S.C. § 1421f

The statutory interpretation question raised in this matter arises from the Organic Act of Guam (48 U.S.C. § 1421, et seq.). This legislation formed the Territory of Guam as an unincorporated territory of the United States. The specific provision in question is section 28, which provides as follows:

> (a) The title to all property, real and personal, owned by the United States and employed by the naval government of Guam in the administration of the civil affairs of the

inhabitants of Guam, including automotive and other equipment, tools and machinery, water and sewage facilities, bus lines and other utilities, hospitals, schools, and other buildings, shall be transferred to the government of Guam within ninety days after the enactment of this Act.

(b) **All other property, real and personal, owned by the United States in Guam, not reserved by the United States within ninety days after the enactment of this Act, is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of Congress, to legislate with respect to such property, real and personal, in such manner as may deem desirable.**

(c) All property owned by the United States in Guam, the title to which is not transferred to the government of Guam by subsection (a) hereof, or which is not placed under the control of the government of Guam by subsection (b) hereof, is transferred to the administrative supervision of the head of the department or agency designated by the President under section 3 of this Act, except as the President may from time to time prescribe: Provided, That the head of such department or agency shall be authorized to lease or sell, on such terms as he may deem in the public interest, any property, real and personal, of the United States under his administrative supervision in Guam not needed for public purposes.

The linchpin to GOVGUAM's claims is that the language of subsection (b), when construed historically with reference to several extrinsic aids to interpretation and the historical relationship between the federal government and Guam (Guam's theories of "Fiduciary Duty" and "Doctrine of Aboriginal Title"), mandates the duty to transfer.

A court's role in applying and interpreting statutes is not always clearly defined by the language of a given statute. This problem is attributable both to the imprecision of language and the inability of statutory drafters to fully anticipate the potential circumstances that may arise in a statute's application. This situation, coupled with the high volume of federal legislation in our nation, has created a significant role for federal courts in interpreting statutory law. As a result, courts and academics have developed, and continue to develop, several different theoretical approaches to interpreting statutory language. Two of the more traditional approaches - (1) the strict textualist approach and (2) the more contextual, attribution of purpose approach – have been advanced by the parties in this case. As discussed below, this Court finds that whether one views section 28(b) through a strict textual or a more contextual purpose-based approach, the outcome is the same. Neither the text nor the purpose/intent of the Organic Act creates the duty to transfer advocated by the Government of Guam.

Section 28(b) specifically declares that: "All other property, real and personal, owned by the United States in Guam, not reserved by the United States within ninety days after the enactment of this Act, is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this act or subsequent Act of Congress, to legislate with respect to such property, real and personal, in such manner as may deem desirable." The parties contest the proper interpretation of the language set forth in this statute. The United States argues that the plain text of the statute controls. Therefore, this statute is inoperative, having completed its purpose ninety days after its enactment. In contrast, GOVGUAM contends that the language of section 28(b) is unclear and ambiguous, therefore precluding the application of the strict textualist approach advocated by the United States. Accordingly, the plaintiff argues that this section must be examined in light of its historical context and with the aid of certain extrinsic sources. Such a contextual examination, contends the plaintiff, demonstrates that this statute created the mandatory duty to transfer. Both of these arguments are discussed below.

(1) Textualist – Plain Meaning Approach

There is little debate that when interpreting a statute, and in determining Congressional intent, the starting point is the plain language of the statute itself. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982); Lewis v. United States, 445 U.S. 55, 60 (1980). The plain textualist approach, advanced by the United States, posits that most questions regarding statutory meaning can be resolved by a simple, straightforward reading of the statute and application of either the plain or most likely meaning of a word/phrase. Griffin, 458 U.S. at 570 (providing an overview of the application of the strict constructionist approach to statutory interpretation). The Griffin Court held that: "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" Griffin, 458 U.S. at 570, quoting, Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). As a result, legislative history and other extrinsic aids used to interpret statutes are rarely needed and should be referred to only in exceptional circumstances. INS v. Cardoza-Fonseca, 480 U.S. 421, 453-54 (1987) (where the language of a statute is clear, courts should not examine legislative history); TVA v. Hill, 437 U.S. 153 (1978), citing, Ex parte Collett, 337 U.S. 55, 61 (1949) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning."); In re Perroton, 958 F.2d 889, 893 (9th Cir. 1992) ("If the language of the statute is clear and unambiguous, judicial inquiry is complete and that language controls absent rare and exceptional circumstances."); Fernendez v. Brock, 840 F.2d 622, 632 (9th Cir. 1988) ("Unless exceptional circumstances dictate otherwise, if we find that statutory language unambiguous, then we will not resort to the legislative history."), citing, Burlington Northern Railroad Co. v. Oklahoma Tax Commission, 481 U.S. 454, 461-62 (1987); Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985).

In applying strict textual interpretation, courts have adopted a number of general rules. Absent a clearly expressed legislative intention to the contrary, a statute's language must ordinarily be regarded as conclusive. Sacramento Regional County Sanitation

Dist. v. Reilly, 905 F.2d 1262, 1268-69 (9th Cir. 1990); see also Rubin v. United States, 449 U.S. 424 (1981) (citations omitted); United States v. Rone, 598 F.2d 564, 569 (9th Cir. 1979). If the language at issue has a settled meaning, it is inferred that the legislature meant to incorporate the established meaning, unless the statute dictates otherwise. See American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) ("As in all cases involving statutory construction, . . . we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"), quoting, Richards v. United States, 369 U.S. 1, 9 (1962).

Here, the United States contends, and this Court concurs, that the plain meaning of section 28(b) settles this case. The language of the statute is clear. The statute states in "reasonably plain terms" that real property "[o]wned by the United States in Guam, not reserved by the United States within ninety days after the enactment of this Act, is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam." These words express that the United States had an affirmative duty to either reserve property or transfer it to the local government no later than ninety days after enactment. Nothing in the language statute, or the direct legislative history, required or authorized this statute to have a "continuing force" beyond the ninety day period. Nor does the language selected by Congress imply, directly or indirectly, that the United States' use of section 28 reserved lands be limited to military purposes. In sum, the plain language of section 28(b) is determinative. The section 28(b) duty to transfer was a one-time, discretionary duty which expired on October 30, 1950. No mandatory, continuing duty to transfer was created by these words.

This conclusion is supported by an examination of the operative language in section 28(b). The words, punctuation and grammar employed by the drafters demonstrate the intent that these provisions created the legal mechanism for a one-time transfer. Specifically, the punctuation and structure of this statute demonstrate the intent that the transfer of the subject property was a then present event. However, the actual transfer of control was subject to an express condition[8]: "[p]roperty, owned by the United

[8] This "reservation" condition can be viewed as either a condition precedent - where its nonoccurrence within the 90-day period triggered the actual duty to

States in Guam, **not reserved by the United States within ninety days after the enactment of this Act**, is hereby placed under the control of the government of Guam, ..." This condition gave the United States the option, within ninety days, to reserve or exempt specific property from this duty to transfer. Accordingly, the plain language of section 28(b) conditioned the actual transfer of control upon the occurrence or nonoccurrence of this express condition. This reading of section 28(b), that the ninety day reservation clause made the duty to transfer conditional, is supported by the fact that the drafters choose to separate the reservation language with commas. See generally Norman J. Singer, 2A Sutherland Statutory Construction ("Sutherland Statutory Construction") § 47.15 ("an act should be read as punctuated unless there is some other reason to do otherwise, . . .").

Additionally, GOVGUAM's "duty to transfer" argument is wholly unsupported by any word, phrase or sentence in section 28 or in any section of the Organic Act. There is simply no evidence that the textual result reached above is "demonstrably at odds with the intention of its drafters." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989), quoting, Griffin, 458 U.S. at 571 (collectively standing for the proposition that to warrant an inquiry beyond the text of a statute it must be demonstrated that the textual result "will produce a result demonstrably at odds with the intention of its drafters."'); see also Hallstrom v. Tillamook County, 493 U.S. 20, 28 (1989). This Court declines GOVGUAM's invitation to read section 28 as creating either a continuing duty to transfer or a military-only use restriction.

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transfer - or a condition subsequent - whereby through the execution of a reservation the United States "duty to transfer" was eliminated. But this Court need not determine the specific classification of this condition, as under either approach this language expressly qualified the United States duty to perform under the statute. The language of this express condition provided the United States, at its discretion, the option of retaining its interest and control in federal lands on Guam. The exercise of this option allowed the United States an "out," whereby it avoided any section 28(b) duty to transfer these lands to the GOVGUAM.

(c) Section 28(b) is not ambiguous

GOVGUAM reads section 28(b)'s text as being unclear and ambiguous. This argument is apparently designed to create the requirement that section 28(b) be evaluated in light of extrinsic statutory interpretation tools, not merely the words of Congress. In support of its ambiguity argument, GOVGUAM offers three principal arguments. For the reasons discussed below this Court finds all of them unpersuasive.

GOVGUAM puts forth an "absurd results" argument. This argument relies on the rule of statutory interpretation which holds that where a literal construction produces "absurd and unjust results" courts should avoid such a result if an alternative interpretation, consistent with legislative purpose, is available. Griffin, 458 U.S. at 574-75. The reasoning behind this rule of construction is that a legislature may, on occasion, mistakenly disguise its actual intent by incorporating inaccurate language which on its face creates a result directly contrary to its true intent. Under such circumstances, it is the judge's role to intervene in order to avoid the absurd result. Thus, where a strict or literal interpretation produces an absurd result, courts must judicially "redraft the statute" to ensure that the object designed to be reached by the act is met. As a matter of law, this Court agrees that the "plain meaning" approach to statutory interpretation has its limits and must bend when necessary to avoid absurd results. Burns v. United States, 501 U.S. 129, 137 (1991); Green v. Bock Laundry Machine Co., 490 U.S. 504, 527 (1989) (concurring opinion). Nevertheless, this rule of construction does not assist GOVGUAM's position in this case for two independent reasons: (1) there is no "absurd result" in the plain language interpretation of section 28(b), and (2) there is no direct alternative interpretation consistent with the clear legislative purpose.

The plain meaning interpretation, set out above, does not produce an absurd result. GOVGUAM bases its absurdity contention on the point that following the promulgation of Executive Order 10178 (issued on October 30, 1950) there was no real property which qualified for transfer under section 28(b).

GOVGUAM further contends that no land[9] was ever transferred under section 28(b). Therefore, GOVGUAM concludes that section 28(b), if interpreted as a one-time transfer, served no purpose, and a statute without a purpose is per se an absurd result. This argument is unpersuasive as it assumes, without support, that Congress in drafting section 28(b) (August 1, 1950) intended to require the Executive Branch to effect some positive transfer, rather than some alternative purpose. On its face, a reasonable alternative is clearly supported by the plain language: Congress intended section 28(b) to provide the Executive Branch with a ninety-day deadline in which to affirmatively reserve real property. Viewed with this purpose in mind, section 28(b) not only served a purpose but it was a successful piece of legislation.

GOVGUAM has also failed to present objective evidence that section 28(b) clearly means something different from what its plain language says. To take advantage of the "absurd result" rule of construction the party advocating an absurdity must be able to offer an alternative interpretation clearly in line with congressional purpose. Griffin, 458 U.S. at 575. GOVGUAM has not met this burden.

Next, GOVGUAM appears to argue that Congress' use of the present tense ("is hereby") to describe the timing of the transfer of control is erroneous. This argument is based on GOVGUAM's position that even if section 28(b) were interpreted to be a one-time transfer it could only occur after the passage of ninety days. As such, a transfer was necessarily a "future" event and the use of the present rather than the future tense was a grammatical error. Consequently, GOVGUAM contends that the use of such erroneous grammar cannot be used to support the one-time duty interpretation. As a threshold matter, this Court concurs that grammatical analysis of a statute can be, to a limited degree, a helpful tool to assist in divining congressional intent. However, courts should not be so hypertechnical in evaluating a legislature's work that "justice" becomes "the hand maiden of grammar." Value Oil Co. v. Irvington, 377 A.2d 1225, 1231 (N.J. Super. 1977). This is particularly true in this case.

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[9] It appears, based on the parties' memoranda, that there is some question as to whether any land was ever transferred pursuant to section 28(b). Nevertheless, even construing this point in the light most favorable to plaintiff, it does not change the legal determination in this case.

Here, GOVGUAM's improper verb tense argument, upon examination of section 28(b), is unhelpful. Even if the specific statement "is hereby" was misapplied by the drafters, such an oversight fails to render section 28(b) "ambiguous" in terms of statutory construction. Housing Finance and Development Corp. v. Castle, 898 P.2d 576, 589 (Hawaii 1995) ("ambiguity" in a statute exists when the language as read is capable of being understood, by reasonably well-informed individuals as having two or more reasonable meanings). While such use of the present tense may, arguably, be awkward it fails to render section 28(b) capable of being understood, by reasonable persons, to represent anything other than a single one-time duty. Moreover, as discussed above, the specific grammar and punctuation selected by the statute's drafters established a current transfer, subject to the occurrence or nonoccurrence of a specific condition. Under this construction the use of the present tense and the ninety-day delay are compatible.

Third, GOVGUAM propounds that section 28 when read as a whole adds to the alleged ambiguity. Specifically, it is argued that subsection (b) and subsection (c) when considered together create an inconceivable result: that the Secretary of the Interior could potentially control military property. The only confusion arising between the interplay of subsection (b) and (c) is that created by GOVGUAM. These two sections are facially compatible. The ambiguity alleged by GOVGUAM only exists if, as a threshold matter one accepts GOVGUAM's unsupported, restrictive military-use only interpretation of subsection (b). This Court refuses to accept this bootstrap argument as the interrelationship between these two subsections does not create ambiguity. A plain reading of section 28(c) demonstrates that it assigned administrative control of federal property reserved under section 28(b) to a particular federal agency. Additionally, it provided the President the authority to specifically designate, on a case-by-case basis, an alternative controlling agency such as the Department of Defense. Neither the language of subsection (c) nor the interplay between subsections (b) and (c) create confusion. On the contrary, the interaction of these two subsections adds support to the position that subsection (b) did not place a military-only land use limitation on the lands reserved under section 28(b),

thereby affirming the federal government's statutory right to transfer these lands to non-DOD agencies.

In sum, section 28(b) is not textually ambiguous nor does the plain text construction create an absurd result. Accordingly, contrary to the contentions of GOVGUAM, this case does not present the exceptional circumstances necessary to permit this Court to look beyond the applicable statutory language.

(d) Context – Attribution of Purpose Approach

As discussed above, the plain meaning of subsection 28(b) is clear and unambiguous. This Court need not rely on the legislative history or extrinsic arguments proposed by GOVGUAM. United States v. Taylor, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring); Consumer Product Safety Comm'n, 447 U.S. at 108; see also Green v. C.I.R., 707 F.2d 404 (9th Cir. 1983) (stating that "[w]hen interpreting a statute, we need not go beyond its language unless it is ambiguous.") Accordingly, GOVGUAM's congressional-intent based argument is rejected, as a matter of law.

Notwithstanding the above, this Court finds that even if GOVGUAM's argument that section 28(b) is ambiguous were correct, the contextual argument they present would still not create the result they seek. The contextual or purpose-based approach favored by GOVGUAM fails to provide clear support for its interpretation. First, the reliance GOVGUAM places on certain extrinsic aids is, at best, inconclusive. And second, subsection (b) when viewed in the context of the overall legislative purpose of the Organic Act supports the interpretation propounded by the United States, not GOVGUAM. Accordingly, whether this Court adopted a strict constructionist or attribution of purpose approach the outcome would be the same. This conclusion is supported as follows.

GOVGUAM argues, despite a lack of textual support, that an examination of congressional intent behind section 28(b) supports its duty to transfer theory. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (the judiciary's goal in interpreting a statute is to carry out the intent of Congress); see also Hughes Air Corp. v. Pub. Utilities Comm'n, 644 F.2d 1334, 1337 (9th Cir. 1981). In support of this position, GOVGUAM asserts that when

section 28(b) is read with reference to certain legislative materials and related statutes the mandatory duty to transfer becomes readily apparent. In particular, GOVGUAM relies on two principal extrinsic aids: (1) a subcommittee report and (2) prior "related" legislation.

(1) Legislative Subcommittee Report

The primary source of GOVGUAM's intent/purpose argument is the limited legislative history available – a subcommittee "site report" and the subsequent committee hearing. H.R. Rep. No. 1677, 81st Cong., 2nd Sess., App. 3 (1950) (GOVGUAM Exh. 64); Organic Act of Guam: Hearing on H.R. 4499 Before the Executive Session of the Committee on Interior and Insular Affairs, 81st Cong., 2nd Sess. (January 30, 1950) (GOVGUAM Exh. 65). GOVGUAM points to statements in these exhibits as evidence that Congress intended that subsection 28(b) of the Organic Act create a mandatory, continuing duty to transfer. Although the Court concurs that the statements made in the 1949 subcommittee "site report" provide some support for the argument that, in 1949, a special congressional subcommittee from the Public Lands Committee favored a general proposition that excess military land should be returned to private, displaced landowners. However, GOVGUAM's contention that this general belief supports its duty to transfer theory is an inference which draws too much from too little.

First, the specific statements of the subcommittee fail to expressly state that the goal of transferring excess military land to private landowners was a goal to be obtained through the Organic Act. Rather these statements, read in context, are aspirational in nature; and more importantly, these statements were not particular recommendations included in the Organic Act. Compare H.R. Rep. No. 1677, 81st Cong., 2nd Sess., App. 3, pp. 9-10 (setting out several clear and specific recommendations for Organic Act amendment) with H.R. Rep. No. 1677, 81st Cong., 2nd Sess., App. 3, p. 11 (generally discussing the ongoing issue of settlement of private land disputes on Guam; inferring that the pre-Organic Act method of settling these disputes was working). In fact, the paragraph in which this special subcommittee addressed the land issue was a discussion of the settlement of "private" land claims –

a matter wholly unrelated to the formation of the civilian government as contemplated by the Organic Act. As well, this specific subject is not addressed in either the text of the Organic Act or by any of the comments/questions of the legislators in the subsequent hearings.

Second, the failure of Congress to expressly adopt the subcommittee's language in drafting the Organic Act undermines the importance of this site report. Here, the subcommittee-generated report and the committee hearing specifically addressed the recommendation that the armed forces resurvey its military needs "[s]o that all land not absolutely required for military purposes may be returned to private ownership and use." This statement is simple, clear and unambiguous. Nevertheless, this is not the language used by the drafters of section 28(b). It is a reasonable conclusion that Congress purposefully selected the statutory words of section 28(b) rather than the words of the site report in order to convey an alternative intention. Unlike the plaintiff, this Court believes that Congress has the ability and wisdom to speak directly and with precision. Had the 81st Congress intended the result advanced by GOVGUAM it would have said so.

Lastly, such subcommittee reports and committee hearings are, for a multitude of reasons, generally considered to be very poor aids to interpreting legislative intent. See Regan v. Wald, 468 U.S. 222, 236-38 (1984) (statements of subcommittee hearings, mark up sessions, floor debates, and House and Senate reports cannot overcome plain meaning of statute); Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (stating a reluctance to using committee reports as aids to interpretation; stating that: "I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill."); see also Wallace v. Christenson, 802 F.2d 1539, 1550 (9th Cir. 1986) (Kozinski, J., concurring) (expressing the problems of relying on legislative history to support statutory interpretation, specifically the dangers inherent in committee reports; stating that such "Reports are usually written by staff or lobbyists, not legislators; few if any legislators read the reports; they are not voted on by the committee whose views they

supposedly represent, much less by the full Senate or House of Representatives; they cannot be amended or modified on the floor by legislators who may disagree with the views expressed therein. Committee reports that contradict statutory language or purport to explicate the meaning or applicability of particular statutory provisions can short-circuit the legislative process, leading to results never approved by Congress or the President.") Accordingly, these statements will be given the limited weight they deserve in evaluating the intent of the 81st Congress.

(2) Land Transfer Act of 1945 and Land Acquisition Act of 1946

GOVGUAM also argues, through the application of pari materia, that the legislative history of the Land Transfer Act of 1945 and the Land Acquisition Act of 1946 (collectively "Land Acts") justify their interpretation. This Court does not agree. The para materia canon of construction does not apply in this case. Before a court can rely on the doctrine of para materia to interpret a statute it must be demonstrated that the statute to be relied upon relates to the same subject, object and purpose of the statute being evaluated. Wong Kam Wo v. Dulles, 236 F.2d 622, 625 (9th Cir. 1956) (declining to apply principle of pari materia as an interpretive guide where first statute has broad purpose and second has a more limited, narrow purpose); see generally United States v. Curtis, 988 F.2d 946, 948-49 (9th Cir. 1993); 2B Sutherland Statutory Construction § 51. The statutes GOVGUAM considers in pari materia, although remotely similar, contemplate wholly different objectives. See 2B Sutherland Statutory Construction § 51.03, quoting, State v. DiCarlo, 338 A.2d 809, 811 (New Jersey 1975) (" 'The adventitious occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will normally not justify applying the rule.'") In this case, the mere fact that these Land Acts and the Organic Act both relate to Guam does not make them sufficiently similar to justify the application of this canon of construction[10]

[10] Furthermore, GOVGUAM has failed to make a showing that Congress intended these land statutes to be related to the Organic Act. Curtis, 988 F.2d at 948-49 (9th Cir. 1993), citing, 2B Sutherland Statutory Construction § 51.01 ("[I]n the absence of some evidence that the legislators were cognizant of the

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Only in the broadest sense are these Land Acts and the Organic Act analogous to each other; their similarity is confined to the most generic sense. While both statutes relate to the United States' relationship with Guam, beyond that generality, the assertion that these statutes must be similarly construed ignores the different purposes served by these statutes and the dissimilar contexts to which they apply. For instance, the Land Transfer Act of 1945 was a single-issue, specific (post-World War II) provision which expressly provided the Secretary of the Navy the discretion and authority to transfer lands no longer required for military purposes to "individual residents" of Guam. The declared purpose of this Act was to effect "the rehabilitation and resettlement of the [individual] residents of Guam, ..." See Guam Land Transfer Act of 1945 (GOVGUAM Exhibit 50); see also Guam Land Transfer Act of 1945, Preamble ("To authorize the Secretary of the Navy to transfer land for the resettlement in Guam, and for other purposes."). The focus and object of Congress in drafting this legislation was the transfer of surplus lands to private, individual Guam residents. In contrast, the clear focus of Congress, five years later, in drafting the Organic Act was the establishment of a local, civilian government for the Territory. See Organic Act of Guam, Preamble ("To provide a civil government for Guam, and for other purposes."); H.R. Rep. No. 1677, 81st Cong., 2d Sess., (GOVGUAM Exhibit 64). Moreover, to the extent that section 28 of the Organic Act provided for land transfers such transfers were intended to be for public, not private, purposes. H.R. Rep. No. 1677, 81st Cong., 2d Sess., App. 4, p. 15 (GOVGUAM Exhibit 64). The distinction is clear. These statutes neither serve the same distinct purposes nor do they treat the same subject matter, these statutes are not in pari materia.

(b) Context and Purpose Reaffirm Textual Interpretation

Attempting to interpret a statute based on "congressional intent" is somewhat misleading. In determining legislative

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other statutes the presumption that the legislature was aware of prior legislation should be rejected and the act not so construed in para materia unless all other means of determining the intent of the legislature have been exhausted.")

purpose, just as in selecting relevant legislative history, there is something for everyone. A determination of a legislature's intent often requires a court to choose from among several alternative "purposes." See generally Judge Richard A. Posner, Overcoming Law p. 392 n.10 (1995), citing, Max Radin, Statutory Interpretation, 43 Harv.L.Rev. 863, 881 (1930). For example, in this case, even if this Court were required to look beyond the text of section 28(b) to interpret its meaning the outcome of this motion would be unchanged. Applying the contextual, purpose-based approach advanced by the plaintiff merely confirms the plain test of section 28(b). This finding is based on the fact the purpose of section 28, and more specifically subsection (b), was to provide a mechanism whereby the administrative control of land or property controlled by the Naval Government of Guam could be transferred to an appropriate substitute agency, upon its dissolution. The basis of this finding is found in the text of section 28 and is supported by legislative history and several statutory canons of construction.

To begin, section 28 was included in an "Organic Act" not a "Land Transfer Act." The Organic Act was enacted for the clear and primary purpose of establishing a local, civilian government for the Territory of Guam. Thus, unlike the Land Transfer Act or Land Acquisition Act, the Organic Act (or Section 28) was not intended to remedy the displacement of private land owners by the United States military. This conclusion is well-supported by the preamble[11] of the Organic Act, which states: "To provide a civil government for the island of Guam, and for other purposes." Additionally, this legislative intent in drafting the Organic Act is clearly addressed in the same legislative history relied on by GOVGUAM. See generally H.R. Rep. No. 1677, 81st Cong., 2d Sess. Throughout the language of the Organic Act and the limited legislative history, it is clear that the overriding purpose of this legislation was the creation of an autonomous government for the Territory of Guam. See also Agana Bay Development Company, 529 F.2d at 954. Accordingly, given this general intent of the

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[11] While this Court recognizes the limited authority often attributed to statements in a statute's preamble, the clarity of congressional purpose in the text of the Organic Act's preamble cannot be dismissed, particularly, in a case such as this where the plaintiff claims there is a dispute as to the drafter's intention or the scope of a statute. Accordingly, this Court will consider the preamble statement.

Organic Act there is little doubt that the most reasonable and likely intent behind section 28 was the enactment of an administrative provision to transfer government-use or public property from the pre-1950 Naval Government of Guam to the newly-formed civilian government. Gustafson v. Alloyd Co., Inc., 115 S.Ct. 1061 (1995) (reaffirming that Acts of Congress should be read as a whole rather than as a series of unrelated or isolate provisions); Kokoszka v. Belford, 417 U.S. 642, 650 (1974); see generally 2A Sutherland Statutory Construction § 46.05 (endorsing the "whole act rule" which advocates that in construing a section of a statute each section must be interpreted in harmony with the general purpose and intent of the entire legislative act).

Additional support for this Court's conclusion is seen when subsections (a), (b) and (c) are read together. Kokoszka, 417 U.S. at 650 (holding that when interpreting a statute the various provisions are to be read in connection not in isolation). Viewed as a whole, it is quite apparent that the goal of section 28 was the smooth administrative transfer and assignment of public lands during the transition from the Naval Government of Guam to the Territorial Government of Guam. First, subsection (a) ensured that the property needed to administer a local government was transferred to the new local government. Second, subsection (b) ensured that "all other property" not required to administer the local government was transferred, at the discretion of the Executive Branch, to either an alternative federal agency or the local government. And third, subsection (c), designated the federal agency to administratively control federal lands after the dissolution of the Naval Government. See Parties' Stipulated Facts, paragraphs 19-25. Given the fact that the purpose of the Organic Act was the formation of the Territorial Government of Guam (locally run) and the requisite dissolution of the Naval Government of Guam (federally run) this reading appears to be logically, obvious and indisputable. Accordingly, GOVGUAM's position that the purpose of section 28(b) was to return excess military land to the government of Guam must fail.

CONCLUSION

This Court fully understands the history of the relationship between the United States, Guam and the Chamorro people

regarding property disputes. It cannot be denied that these issues are full of emotional and moral-based viewpoints. Nonetheless, the fact that there is disagreement with the actions of the United States does not in and of itself create a legal cause of action. GOVGUAM's remedy for its dissatisfaction with the process by which the federal government allocates excess military lands lies with the political process and the enactment of new legislation, not within the parameters of section 28 of the Organic Act.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the United States shall, as to their causes of action, prepare and submit the appropriate judgment, stipulated as to form by all parties, in accordance with the findings and conclusions herein. See generally Fed.R.Civ.P. 54; L.R. 54.1.

Dated: July 16, 1997

/s/John S. Unpingco
JOHN S. UNPINGCO
District Judge

APPENDIX F

Executive Order No. 108-A, December 23, 1898, is as follows:

The Island of Guam in the Ladrones is hereby placed under the control of the Department of the Navy. The Secretary of the Navy will take such steps as may be necessary to establish the authority of the United States and to give it the necessary protection and Government.

/s/ William McKinley
William McKinley

APPENDIX G

The Guam Land Transfer Act of November 15, 1945, Pub. L. No. 225, 59 Stat. 584, is as follows:

> Sec. 1. That for the purpose of effecting the rehabilitation and resettlement of the residents of Guam, the Secretary of the Navy, or such officer as he may designate for such purpose and under such regulations as he may prescribe, is hereby authorized to transfer to the naval government of Guam, for transfer or sale by the naval government of Guam at its discretion, to such persons and upon such terms and conditions and at such times as it may determine to be suitable, in replacement of lands acquired for military or naval purposes in Guam, such lands owned by the United States in Guam as may be determined by the Secretary of the Navy, after consultation with the Secretary of War, not to be required for military or naval purposes.

APPENDIX H

The Guam Land Acquisition Act of August 2, 1946, Pub. L. No. 594, 60 Stat. 803, is as follows:

Sec. 1. The Secretary of the Navy is hereby authorized to acquire in the name, and for the use, of the United States, by purchase or otherwise, land and rights pertaining thereto situated on or within the island of Quam [sic], including interests in fee, leasehold interests with or without option to purchase interests in fee, and rights-of-way and easements both temporary and perpetual for highways, drainage system, water supply and water distribution facilities, power lines, communication systems, and communication distribution facilities, upon conveyance of title acceptable to him or to such other officer as he may designate without regard to and notwithstanding section 355 of the Revised Statutes, as amended, or any other provision of law requiring approval of title by the Attorney General of the United States. The authority contained herein may include, but shall not be limited to, acquisitions for the purpose set forth in Public Law 225 of the Seventy-ninth Congress, approved November 15, 1945.

Sec. 2. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $1,630,000 to effectuate the purposes of this Act.

APPENDIX I

Section 28 of the Guam Organic Act of August 1, 1950, Pub. L. No. 630, 64 Stat. 392, now 48 U.S.C. § 1421f, as originally enacted, was as follows:

(a) The title to all property, real and personal, owned by the United States and employed by the naval government of Guam in the administration of the civil affairs of the inhabitants of Guam, including automotive and other equipment, tools and machinery, water and sewerage facilities, bus lines and other utilities, hospitals, schools, and other buildings, shall be transferred to the government of Guam within ninety days after the date of enactment of this Act.

(b) All other property, real and personal, owned by the United States in Guam, not reserved by the President of the United States within ninety days after the date of enactment of this Act, is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable.

(c) All property owned by the United States in Guam, the title to which is not transferred to the government of Guam by subsection (a) hereof, or which is not placed under the control of the government of Guam by subsection (b) hereof, is transferred to the administrative supervision of the head of the department or agency designated by the President under section 3, of this Act,* except

* By Pub. L. No. 90-497 in 1968, "the Secretary of the Interior" was substituted for "the head of the department or agency designated by the President under

as the President may from time to time otherwise prescribe: *Provided,* That the head of such department or agency shall be authorized to lease or to sell, on such terms as he may deem in the public interest, any property, real and personal, of the United States under his administrative supervision in Guam not needed for public purposes.

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section 3, of this Act," and "the head of such department or agency." See "Historical and Statutory Notes" to 48 U.S.C.A. § 1421f.

APPENDIX J

Section 33 of the Guam Organic Act of August 1, 1950, Pub. L. No. 630, 64 Stat. 393, 48 U.S.C. § 1421k, is as follows:

> Nothing contained in this chapter shall be construed as limiting the authority of the President to designate parts of Guam as naval or military reservations, nor to restrict his authority to treat Guam as a closed port with respect to the vessels and aircraft of foreign nations.

APPENDIX K

Executive Order No. 10178, October 30, 1950, 15 F.R. 7313, is as follows:

WHEREAS section 28 of the Organic Act of Guam, approved August 1, 1950 (Public Law 630, 81st Congress), reads:

[text of sec. 28, as in App. I, *supra*]

WHEREAS certain hereinafter-described real and personal property of the United States in Guam is required for the respective uses of the Department of the Army, the Department of the Navy, the Department of the Air Force, and the Coast Guard, and it has been mutually agreed that the Department of the Navy shall act on behalf of the Department of the Army, the Department of the Air Force, and the Coast Guard with respect to their requirements as to such property;

WHEREAS certain other hereinafter-described real property of the United States in Guam has been selected by the Secretary of the Navy for transfer or sale pursuant to the act of November 15, 1945, 59 Stat. 584, to persons in replacement of lands acquired for military or naval purposes in Guam, and such property should remain available for disposition by the Secretary of the Interior in his discretion under section 28(c) of the said Organic Act of Guam; and

WHEREAS certain other hereinafter-described personal property of the United States in Guam should remain available for the respective needs of the Department of the Army, the Department of the Navy, the Department of the Air Force, the Coast Guard, and other agencies of the United States:

NOW THEREFORE, by virtue of the authority vested in me by the said section 28 of the Organic Act of Guam, and as President of the United States, it is ordered as follows:

1. The following-described real and personal property of the United States in Guam is hereby reserved to the United States and placed under the control and jurisdiction of the Secretary of the Navy: *Provided,* That the secretary of the Navy shall transfer such portions of such property to the Department of the Army, the Department of the Air Force, and the Coast Guard as may be required for their respective purposes:

(a) All of that real property in Guam situated within the perimeter areas defined in the following-designated condemnation proceedings in the Superior Court of Guam, being the same property quitclaimed by the Naval Government of Guam to the United States of America by deed dated July 31, 1950, and filed for record with the Land Registrar of Guam on August 4, 1950 (Presentation No. 22063):

[follows a list of lands, identified by condemnation proceeding no., perimeter area, and title of the facility—totaling 42,380.207 acres]

(b) The road system and utilities systems described in the said deed between the Naval Government of Guam and the United States of America dated July 31, 1950.

(c) The following-described areas: Mount Lam Lam Light; Rear Range Light; Mount Aluton Light; Area Number 35 Culverts; Mount Santa Rosa Light; 36 acres of Camp Witek; Adelup Reservoir; Tripartite Seismograph Station Site, Land Unit M, Section 2, Land Square 20; the Power Sub-station located on Lot 266, Municipality of Agat adjacent to Erskine Drive, City of Agat.

(d) Lots 2285-5 and 2306-1 in Barrigada.

(e) All personal property relating to or used in connection with any of the above-described real property.

2. The following-described real property of the United States in Guam is hereby reserved to the United States and transferred to the administrative supervision of the Secretary of the Interior, and shall be available for disposition by the Secretary of the Interior in his discretion under section 28(c) of the said Organic Act of Guam:

> All of those lands which have been selected by the Secretary of the Navy for transfer or sale pursuant to the act of November 15, 1945, 59 Stat. 584, to persons in replacement of lands acquired for military or naval purposes in Guam, a list and description of such lands being on file in the Department of the Navy.

3. In addition to the personal property described in paragraph 1(e) hereof, there is hereby reserved to the United States all personal property of the United States in Guam, except that which is transferred to the government of Guam by or pursuant to section 28(a) of the Organic Act of Guam, which on the date of this order is in the custody or control of the Department of the Army, the Department of the Navy, the Department of the Air Force, the Coast Guard, or any other department or agency of the United States; and all such personal property shall remain in the custody and control of the department or agency having custody and control thereof on the date of this order.

Harry S. Truman

APPENDIX L

Section 1(a) and (b) of the Territorial Submerged Lands Act of October 5, 1974, Pub. L. No. 93-435, 48 U.S.C. § 1705(a) and (b), is as follows:

(a) Subject to valid existing rights, all right, title, and interest of the United States in lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastlines of the territories of Guam, the Virgin Islands, and American Samoa, as heretofore or hereafter modified by accretion, erosion, and reliction, and in artificially made, filled in, or reclaimed lands which were formerly permanently or periodically covered by tidal waters, are hereby conveyed to the governments of Guam, the Virgin Islands, and American Somoa, as the case may be, to be administered in trust for the benefit of the people thereof.

(b) There are excepted from the transfer made by subsection (a) hereof--

(i) all deposits of oil, gas, and other minerals, but the term "minerals" shall not include coral, sand, and gravel;

(ii) all submerged lands adjacent to property owned by the United States above the line of mean high tide;

(iii) all submerged lands adjacent to property above the line of mean high tide acquired by the United States by eminent domain proceedings, purchase, exchange, or gift, after October 5, 1974, as required for completion of the Department of the Navy Land Acquisition Project relative to the construction of the Ammunition Pier authorized

by the Military Construction Authorization Act, 1971 (84 Stat. 1204), as amended by section 201 of the Military Construction Act, 1973 (86 Stat. 1135);

(iv) all submerged lands filled in, built up, or otherwise reclaimed by the United States, before October 5, 1974, for its own use;

(v) all tracts or parcels of submerged land containing on any part thereof any structures or improvements constructed by the United States;

(vi) all submerged lands that have heretofore been determined by the President or the Congress to be of such scientific, scenic, or historic character as to warrant preservation and administration under the provisions of sections 1 and 2 to 4 of Title 16;

(vii) all submerged lands designated by the President within one hundred and twenty days after October 5, 1974;

(viii) all submerged lands that are within the administrative responsibility of any agency or department of the United States other than the Department of the Interior;

(ix) all submerged lands lawfully acquired by persons other than the United States through purchase, gift, exchange, or otherwise;

(x) all submerged lands within the Virgin Islands National Park established by sections 398 to 398b of Title 16, including the lands described in sections 398c and 398d of Title 16; and

(xi) all submerged lands within the Buck Island Reef National Monument as described in Presidential Proclamation 3448 dated December 28, 1961.

Upon request of the Governor of Guam, the Virgin Islands, or American Samoa, the Secretary of the Interior may, with or without reimbursement, and subject to the procedure specified in subsection (c) of this section convey all right, title, and interest of the United States in any of the lands described in clauses (ii), (iii), (iv) (v), (vi), (vii), or (viii) of this subsection to the government of Guam, the Virgin Islands, or American Samoa, as the case may be, with the concurrence of the agency having custody thereof.

Supreme Court, U.S.
FILED
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(2)

No. 99-818

In the Supreme Court of the United States

GOVERNMENT OF GUAM EX REL.
GUAM ECONOMIC DEVELOPMENT AUTHORITY,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

1. Whether Section 28(b) of the Organic Act of Guam, 48 U.S.C. 1421f(b), requires the United States to transfer to the control of the Government of Guam lands that were reserved by the President of the United States in 1950 but have since been determined not to be needed for military use.

2. Whether the Government of Guam may assert against the United States claims to land on behalf of the aboriginal inhabitants of Guam.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is reported at 179 F.3d 630. The opinions of the district court (Pet. App. 23a-26a, 27a-56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1999. A petition for rehearing was denied on August 12, 1999 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 28 of the Organic Act of Guam of August 1, 1950 (Guam Organic Act), provided as follows:

> (a) The title to all property, real and personal, owned by the United States and employed by the naval government of Guam in the administration of the civil affairs of the inhabitants of Guam, including automotive and other equipment, tools and machinery, water and sewerage facilities, bus lines and other utilities, hospitals, schools, and other buildings, shall be transferred to the government of Guam within ninety days after *the date of enactment of this Act.*
>
> (b) All other property, real and personal, owned by the United States in Guam, not reserved by the President of the United States within ninety days after *the date of enactment of this Act,* is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable.
>
> (c) All property owned by the United States in Guam, the title to which is not transferred to the government of Guam by subsection (a) hereof, or which is not placed under the control of the government of Guam by subsection (b) hereof, is transferred to the administrative supervision of *the head of the department or agency designated by the President under section 3 of this Act,* except as the

> President may from time to time otherwise prescribe: *Provided*, That *the head of such department or agency* shall be authorized to lease or to sell, on such terms as he may deem in the public interest, any property, real and personal, of the United States under his administrative supervision in Guam not needed for public purposes.

Ch. 512, 64 Stat. 392 (emphasis added). That provision remains in effect, except that the italicized phrases in subsections (a) and (b) have been replaced with "August 1, 1950," and the italicized phrases in subsection (c) have been replaced with the phrase "the Secretary of the Interior." See 48 U.S.C. 1421f.

2. President Truman issued Executive Order No. 10,178 on October 30, 1950. See 15 Fed. Reg. 7313. That Order reserved to the United States various categories of real and personal property, including more than 42,000 acres of land. See *id.* at 7315; Pet. App. 4a, 30a, 64a-65a. That acreage appears to have included most, and perhaps all, of the land then owned by the United States in Guam. *Id.* at 46a-47a & n.9. For that reason, little if any land was actually transferred to the control of the government of Guam pursuant to Section 28(b). *Ibid.*

Between 1950 and 1991, the United States acquired additional land in Guam by condemnation and transferred slightly more than 4000 acres of unneeded land to the government of Guam. Pet. App. 4a-5a. In 1992 the Department of the Navy declared to be "excess" (a) 371 acres of land at Ritidian Point and (b) 15,571 acres of adjacent submerged land. *Id.* at 5a. The Navy transferred the 371 acres of dry land to the United States Fish and Wildlife Service for use as part of a wildlife refuge. *Ibid.* The submerged land was transferred to

the General Services Administration for later redistribution. *Ibid.* In April 1995, the Department of Defense published the "Guam Land Use Plan 1994," which identified another 8200 acres of land in Guam as land no longer needed for military purposes. *Ibid.*

3. In September 1995, the government of Guam (petitioner in this Court) brought this action against the United States and several federal agencies. Petitioner sought title to or control over three categories of land: the 371 acres at Ritidian Point, the 15,571 acres of adjacent submerged land, and 3553 acres of land that is currently administered by the Air Force but was identified as unneeded for military purposes in the Defense Department's Guam Land Use Plan 1994. See Pet. App. 31a. The gravamen of the suit is that Section 28(b) of the Guam Organic Act, 48 U.S.C. 1421f(b), imposes a continuing obligation on the United States government to relinquish control over any property in Guam that ceases to be needed for military purposes. See Pet. App. 7a, 33a. Petitioner also asserted a claim to the same lands based on a theory of "aboriginal title." See *id.* at 5a, 39a-40a.

The district court granted the United States' motion for summary judgment. Pet. App. 27a-56a. The court declined to resolve the question whether the doctrine of aboriginal title applies to Guam, based on petitioner's concession that proof of aboriginal title would not "mandate a present duty to transfer land." *Id.* at 39a-40a. The court rejected petitioner's claim under Section 28(b) of the Guam Organic Act, holding that Section 28(b), by its plain terms, contemplated a "one-time transfer" of property to the government of Guam. *Id.* at 44a. In the district court's view, Section 28(b) did not require that any lands reserved by the President within the 90-day period must be used for military purposes,

and it did not create a continuing duty to transfer reserved lands under any circumstances. *Id.* at 44a-45a.

The district court subsequently denied petitioner's motion for reconsideration. Pet. App. 23a-26a. The court again declined to determine whether the doctrine of aboriginal title applies to Guam. It explained that even if the doctrine did apply, the "United States, as title holder or trustee, would not be required to transfer any lands to [the government of Guam] as a substitute trustee." *Id.* at 24a.

4. The court of appeals affirmed. Pet. App. 3a-21a.

a. With respect to petitioners' claim under Section 28(b) of the Guam Organic Act, the court explained:

> The plain wording of § 28(b) establishes that Congress intended a one-time grant of property. Section 28(b) contains two interrelated clauses. The first clause gives the Guamanian government control over all property not already transferred to it under § 28(a). The second clause, however, conditions that grant on the President's not reserving the property within 90 days * * *.
>
> After 90 days, the condition was satisfied and the grant of property was complete: Guam owned or controlled all the property previously owned by the United States, except for the property that the President had reserved. Nothing in the wording of the statute suggests that § 28(b) has continuing force or that § 28(b) requires the United States to transfer all property that it owns in Guam that is no longer used for a military purpose.

Pet. App. 8a.

The court of appeals explained (Pet. App. 8a-9a) that its reading of Section 28(b) is supported by Section

28(c). The final clause of Section 28(c) states that where land has been reserved by the President under Section 28(b) and placed under the administrative supervision of the head of a department or agency, the department or agency head may lease or sell it "on such terms as he may deem in the public interest." 48 U.S.C. 1421f(c) (quoted at Pet. App. 9a). The court of appeals observed that the final clause of Section 28(c) "can have meaning only if Congress intended for subsection (b) to constitute a one-time grant of property. Under [petitioner's] reading of the statute, Congress' inclusion of the last clause is superfluous—the United States never could sell any property, because the property would revert to Guam automatically as soon as it was 'not needed for public purposes.'" Pet. App. 9a. The court noted as well that petitioner's reading of Section 28(b) would also undermine the President's authority under Section 28(c) to choose the department that will administer reserved lands. *Ibid.* Under petitioner's approach, the court explained, "the President could give control over [reserved] property to a non-military agency such as the Department of Education, but if that agency used the property for a non-military purpose, then the property would revert to Guam." *Ibid.*

b. The court of appeals also rejected petitioner's claim "that it is entitled to control some of the land at issue under the doctrine of 'aboriginal title.'" Pet. App. 19a. The court "assume[d], without deciding, that the doctrine of aboriginal title applies to the native inhabitants of Guam." *Ibid.* It observed, however, that "the right to aboriginal title belongs only to tribes and, in some circumstances, to individual members of tribes." *Ibid.* Because petitioner "is neither a tribe nor a tribal member," the court held, it "cannot claim any aboriginal right to use or occupy tribal land." *Id.* at 20a.

The court of appeals also rejected petitioner's related claim that petitioner could properly sue as trustee for the aboriginal inhabitants of Guam. The court explained that under the Constitution, the power to set national policy with respect to the treatment of aboriginal peoples is vested in Congress. Pet. App. 20a. The court recognized that Congress may delegate its trust authority, but it rejected petitioner's claim that the Guam Organic Act effects such a delegation. The court explained that "the Organic Act delegates authority over the property at issue to the executive branch of the federal government, not to the territorial government of Guam." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 10-14) that the decision of the court of appeals conflicts with this Court's decision in *Cariño* v. *Insular Government of the Philippine Islands*, 212 U.S. 449 (1909). That claim is wholly without basis. *Cariño* involved the claim of a native inhabitant of the Philippines to land that had been occupied and used by the claimant and his ancestors for an extended period of time. *Id.* at 455-456. The instant case, by contrast, presents no question concerning the circumstances under which a native inhabitant of Guam may assert a claim to land reserved by the United States.

The court of appeals in this case assumed, *arguendo*, that "the doctrine of aboriginal title applies to the native inhabitants of Guam." Pet. App. 19a. The court held, however, that the government of Guam has no

right under the Constitution or the Organic Act to assert such claims, either on its own behalf or on behalf of (unidentified) individual inhabitants. *Id.* at 20a. As we explain below (see pp. 10-11, *infra*) that holding is correct. But in any event, *Carino* has no bearing on the question of petitioner's right to assert aboriginal claims.[1]

2. Section 28(a) of the Guam Organic Act provides that all real and personal property "owned by the United States and employed by the naval government of Guam in the administration of the civil affairs of the inhabitants of Guam * * * shall be transferred to the government of Guam within ninety days after August 1, 1950." 48 U.S.C. 1421f(a). Section 28(b) states that "[a]ll other property, real and personal, owned by the United States in Guam, not reserved by the President

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[1] Petitioner ultimately acknowledges (Pet. 12 n.13) that "the court of appeals did not reach the merits of the aboriginal claim." Petitioner's claim of a conflict with *Cariño* is apparently based on the assertion that the court of appeals "left undisturbed the ruling of the district court on this aspect of the case, which can only be understood as a holding that unextinguished aboriginal title cannot be asserted against the United States, at least in the face of a Presidential reservation apparently authorized by Act of Congress." *Ibid.* In fact, the district court did not hold that "aboriginal title cannot be asserted against the United States"; it simply recognized, in accordance with petitioner's own concession, that a claim of aboriginal title cannot provide the basis for a judicial order directing the United States to transfer land. See Pet. App. 39a-40a. But even if petitioner had accurately characterized the district court's holding, the court of appeals quite plainly declined to express any view regarding the circumstances (if any) under which a native inhabitant of Guam might assert a claim to the land at issue here. See *id.* at 19a-20a. Petitioner's claim therefore reduces to the assertion that the *district court's* analysis conflicts with *Cariño*—a patently insufficient basis for invoking this Court's review.

of the United States within ninety days after August 1, 1950, is hereby placed under the control of the government of Guam." 48 U.S.C. 1421f(b). By its plain terms, Section 28(b)'s effect is limited to property that was "not reserved by the President of the United States within ninety days after August 1, 1950." *Ibid.* That Section therefore cannot reasonably be read to effect a (belated) transfer of control of land that *was* reserved by the President within the 90-day period.

Petitioner contends (Pet. 16) that Section 28(b) is "open to construction" because it "fails to address" the question of "[w]hat happens to land expressly reserved by the President for military purposes in 1950 which later becomes surplus to the needs of the Armed Services." We agree that Section 28(b)—which is limited by its terms to property "not reserved by the President" within the initial 90-day period—does not address the proper treatment of land falling within the category that petitioner describes. But the fact that Section 28(b) does not resolve the question presented here does not create a gap or ambiguity in that Section. To the contrary, Section 28(b) is *unambiguously* irrelevant to any question concerning the appropriate treatment of property that *was* reserved by President Truman in the 1950 Executive Order.

Rather, the propriety of an inter-agency transfer in these circumstances is to be determined by reference to other provisions of law. The Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.* (Property Act), and implementing regulations govern the disposal of federal property deemed to be in excess of the needs of the federal agency charged with its administration. Neither Section 28(b) nor any other provision of the Guam Organic Act gives the government of Guam rights greater than those established by

the Property Act for States and other political subdivisions within whose boundaries federal reserved lands are released by the administering agency. There is consequently no basis for construing Section 28(b) to require that property reserved by the President in 1950 must be transferred to the government of Guam if it ceases to be needed for military purposes.[2]

3. Petitioner contends (Pet. 21-23) that the court of appeals erred in holding that petitioner could not assert a claim of aboriginal title on behalf of (unidentified) native inhabitants. Petitioner cites no decision of any court, however, that has permitted a state or territorial government to assert claims on behalf of native inhabitants in the absence of express statutory authorization. Petitioner does not identify any such authorization, and none exists. The court of appeals recognized that "Congress can delegate its authority over aboriginal land rights," but it correctly held that "the Organic Act

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[2] Petitioner characterizes as "unanswerable" the question "Why would Congress want lands not needed for military purposes to go to Guam if found surplus immediately after enactment, but not if found surplus more than ninety days later?" Pet. 16. Petitioner's argument implicitly assumes that lands not needed for a military purpose in 1950 could not have been reserved for other purposes. But nothing in Section 28(b) restricted President Truman's authority in that manner.

As the court of appeals explained (Pet. App. 8a-9a), petitioner's interpretation of Section 28(b) would also place that Section in tension with Section 28(c), 48 U.S.C. 1421f(c). Section 28(c) authorizes the President to choose the department that will administer lands reserved under Section 28(b), and it authorizes the relevant department head to sell or lease those lands. Those grants of authority would be superfluous if Section 28(b) imposed a continuing duty to transfer reserved lands to the government of Guam when those lands cease to be needed for military purposes. See Pet. App. 9a.

delegates authority over the property at issue to the executive branch of the federal government, not to the territorial government of Guam." Pet. App. 20a.

Petitioner emphasizes (Pet. 23) that it "is not claiming for itself, but only as a specie of 'parens patriae,' prepared, in due course, to make appropriate disposition or dedication of the lands affected in accordance with a later determination of the true owners." It is well established, however, that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government," *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)), and petitioner offers no basis for concluding that a different rule should apply to the territorial government of Guam. Review of this issue is especially unwarranted, moreover, in light of petitioner's prior concession that proof of aboriginal title would provide no basis for a judicial order directing transfer of the relevant lands. See Pet. App. 39a-40a.

4. Contrary to petitioner's suggestion (Pet. 28), there is no meaningful likelihood that the Court's decision in *Rice* v. *Cayetano*, No. 98-818, will affect the proper disposition of this case. The decision in *Rice* may shed light on the question whether the status of native Guamanians is properly regarded as the same as or similar to that of Indians within the continental United States. But the court of appeals in the instant case did not express a view on that issue. Rather, the court decided the case on the grounds that (a) petitioner's statutory argument is foreclosed by the unambiguous language of Section 28(b), and (b) petitioner is not a proper party to assert claims of aboriginal title, either on its own behalf or on behalf of individual

Guamanians. Neither of those holdings is in any way implicated by the questions presented in *Rice*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2000

(3)

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Petitioner,
v.
THE UNITED STATES OF AMERICA, THE DEPARTMENT OF DEFENSE, THE DEPARTMENT OF THE NAVY, THE DEPARTMENT OF THE AIR FORCE, THE DEPARTMENT OF THE INTERIOR, THE UNITED STATES FISH AND WILDLIFE SERVICE, and THE GENERAL SERVICES ADMINISTRATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 28(b) of the Guam Organic Act of August 1, 1950, requires the transfer of control to the Government of Guam of uplands, and tidelands, presently held by the United States but no longer needed for military purposes.

2. Whether, assuming Guam prevails on the First Claim of the Amended Complaint, Section 1(a) of the Territorial Submerged Lands Act of October 5, 1974, requires the transfer of title to the adjacent submerged lands to Guam.

3. Whether, alternatively, assuming unextinguished aboriginal title still attaches to the sum of these lands, control and possession of them must now be transferred to Guam.

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No. 99-818

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1999

THE GOVERNMENT OF GUAM, ex rel.
THE GUAM ECONOMIC DEVELOPMENT AUTHORITY,
Petitioner,
v.
THE UNITED STATES OF AMERICA, THE DEPARTMENT OF DEFENSE, THE DEPARTMENT OF THE NAVY, THE DEPARTMENT OF THE AIR FORCE, THE DEPARTMENT OF THE INTERIOR, THE UNITED STATES FISH AND WILDLIFE SERVICE, and THE GENERAL SERVICES ADMINISTRATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

The brief for the United States in opposition to Guam's petition attains its terseness by quiet avoidance. This reply brief addresses some of the matters the Government avoids.

Section 28(a) of the Organic Act of Guam of August 1, 1950 mandates a transfer to the new civilian government of Guam title to all United States property on Guam used in "civil affairs" (roads, hospitals, and so forth). Subsection (b) provides that all

other property owned by the United States in Guam, "not reserved by the President of the United States within ninety days after the date of enactment of this Act, is hereby placed under the control of the government of Guam . . . ."

Subsection (b) goes on at length: The property so transferred to the new government of Guam is "to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable." Fully 55 words are used to define the authority of the new Guam Legislature in its administration of the lands to be transferred to it. (These lands, of course, as we relate in our Petition, had always been the property either of individual Guamanians, or, by aboriginal right, of the Guamanian people as a whole, until they were confiscated by Spain or the United States.)

Little more than a thousand acres passed to Guam under subsection (a), as the court of appeals noted. *See* Petition 4a. But no lands whatever passed to Guam under subsection (b). For on the 90th day following enactment of the Organic Act, President Truman reserved 42,000 acres of land on Guam, which "appears to have included most, and perhaps all, of the land then owned by the United States in Guam." U.S. Opp. Br. at 3. They did.

Like the court below, the Government has said repeatedly that it reads Section 28(b) to mean that, when the President reserved all federally owned land on Guam on October 30, 1950, the force of that provision was fully spent. *See, e.g.*, U.S. Opp. Br. at 5. As a statement of its position, that is a thunderous understatement. Coyness aside, the United States reads Section 28(b) as never having had any force—as having had no force in 1950, and as having no force now. For the provision was, in terms, written to effect a *transfer* of lands, and yet no land was or is, in the view of the United States, ever to be transferred to Guam under that subsection. To contend, as the United States has, that Section 28(b) was in fact written to effect a *reservation* (not a *transfer)* of lands, trenches on the fanciful. *See, e.g.*, No. 97-17140, C.A. 9, *Brief for the Federal Appellees*, at 17, 20. Under the Property Clause, mere unalloyed silence on the part of Congress would have reserved all federally owned land on Guam to the United States.[1]

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[1] *See* U.S. Const. article IV, § 3, cl. 2; *see also* 2 Shalowitz, *Shore and Sea Boundaries* 443 (1964). For that matter, the President's power to create military

The intention imputed to 28(b) by the Government, then, would have required no word from Congress. And the altogether apparent intention of the section—a transfer of lands to Guam—was not at all what 28(b) was about, according to the United States. Was Section 28(b) then, as the Government contends, a wholly empty provision? To ask the question invites construction. And any of this Court's pertinent canons of construction requires a reversal of the decision below.

ARGUMENT

1. The United States contends that the Ninth Circuit's decision in no way "conflicts with the Court's decision in *Cariño v. Insular Government of the Philippine Islands*, 212 U.S. 449 (1909)." U.S. Opp. Br. at 7. *Cariño* was the case of a Philippine native claiming aboriginal title against the United States. The United States claimed that it had reserved the disputed land under a provision of the Philippines Organic Act (Section 12) that is in all pertinent respects identical with Section 28(b) of the Guam Organic Act. *See* Pet. 11, n.10. Justice Holmes for a unanimous Court in *Cariño* found the statutory provision ambiguous, and stressed repeatedly that any doubt must be resolved in favor of the native claim—that "every presumption is and ought to be against the government in a case like the present." 212 U.S. at 460. The Court ruled in favor of the aboriginal claim.

Cariño, then, upheld a claim of aboriginal title to lands, claimed by the United States, in a former Spanish possession acquired by the Treaty of Paris. It found Section 12 of the Philippines Organic Act—the analogue of and model for Section 28(b) of the later Guam Organic Act—ambiguous and hence open to construction. And it applied the rule of construction favoring the native claim. *See* Pet. 10-14. In each of these respects, the decision of the court of appeals conflicts squarely with the decision in *Cariño*. To borrow Justice Holmes's words, this is "a case like the present."

Lost in the Government's arguments, in this Court and in the courts below, and lost in the decisions of the courts below, is the purpose of our acquisition of the Philippines and Guam. As this Court has observed with respect to the Philippines, that purpose "was to administer property

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reservations is expressly confirmed in another section of the Guam Organic Act. (Sec. 33, 48 U.S.C. 1421k). Thus, Section 28(b) makes no sense if read as a reservation provision. If it does not contemplate a transfer, the whole of the subsection is superfluous.

and rights 'for the benefit of the inhabitants thereof.'" *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284-85 n.18 (1955) (quoting 32 Stat. 695). Only the same enlightened purpose could have underlaid our simultaneous acquisition of Guam.[2]

2. The Government mischaracterizes why Guam asserts Section 28(b) is "open to construction." It is not merely because Section 28(b) does not address the question of what is to become of land reserved for military purposes in 1950 and later found surplus to those needs. *See* U.S. Opp. Br. 9. It is the larger question, described above, as the United States well knows. Section 28(b) is open to construction because, if it were to mean what the United States says, it is a wholly pointless waste of Congressional verbage. Full of sound if not fury, it would signify nothing. Moreover the whole of Section 28 is fraught with ambiguities and perplexities. These we set out in our Petition at pages 14-19. Our submission is thus not nearly so narrow as the United States would have the Court think. Just as its counterpart provision in the Philippine Organic Act was found ambiguous and in need of construction, so also is Section 28(b) of the Guam Act. As we note in our Petition (19-21), the difficulties in the Guam Act disappear when we permit ourselves to consult a page of history, especially when informed by the canon of construction so emphatically invoked in *Cariño*.

3. The United States next asserts that the Government of Guam is not the proper party to pursue the aboriginal-title claims of the native people of Guam. The United States, needless to say, is hardly the proper party to pursue the land claims of the native Chamorros. And that is so for reasons more compelling than the ordinary conflict of interest. (In all such cases, whatever lands the natives lose become the property of the United States.) For here, the United States denies, in the most emphatic (not to mention pettifogging) way, the land claims of the native people of Guam. The United States is thus hardly the proper representative of the

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[2]The Court's quotation is a reference to Section 12 of the Philippines Organic Act, quoted in Pet. 12 n.12, which enjoins the territorial government, upon receiving federal lands, to administer them in the interest of the natives. *See Cariño*, 212 U.S. at 458-59. As already noted, the provision finds an exact parallel in Section 28(b) of the Guam Organic Act, which likewise directs that the land transferred to the local government shall be "administered for the benefit of the people of Guam." Neither the Government nor the courts below have suggested a reason why these virtually identical provisions, the second obviously taken from the first, should not have the same import in the Philippines and in Guam, neighboring islands acquired from Spain by the same Treaty of Paris.

native people in this case, and it doesn't pretend otherwise. But it doesn't tell us who is.

If the United States were at all solicitous of the rights of the native people of Guam, it could do better than merely deny the standing of their territorial Government to assert those rights. It could tell us who, in its view, is entitled to assert them. In the courts below the United States suggested that only tribal leaders could assert those rights. But there are no tribal chieftains on Guam, as the United States well knows; they were killed in genocidal warfare of years past. Rogers Decl. at 5-7; U.S. Navy, "Report on Guam, 1899-1950" (Dept. of the Navy, Chief of Naval Operations 1951) at 1-2 [Guam Exh. 28]. Perhaps the United States has abandoned now its claimed need for tribal units to assert native rights on Guam, as it has in the case of native Hawaiians in its powerful amicus brief in *Rice v. Cayetano*, No. 98-818.

Regardless, the decisions of this Court, which has historically considered as its particular province the final adjudication of claims of native rights, leave no question that the Government of Guam is here a proper plaintiff. As we wrote in our Petition (22-23), native claims have been presented in court by tribal chieftains, an Indian superintendent, a group acting for all the Indians within a State, the United States of course, and by a State through its Attorney General.[3] Nothing in these cases, nor in any cited by the Government, precludes suit by a territorial government where there is no other apparent proper suitor. It would be a perverse irony indeed if native Guamanians, entitled to "every presumption . . . in a case like the present," are to be denied relief because, their tribal chieftains having long ago been slaughtered, there is no one left alive who can now maintain the suit.

The United States asserts that "'[a] State does not have standing as *parens patriae* to bring an action against the Federal Government,'" quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), which in turn cites to *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). The passage from *Snapp*, though, was dictum,

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[3] *See, Indians of California v. United States*, 98 Ct. Cl. 583 (1942), *cert. denied*, 319 U.S. 764 (1943); *Indians of California*, 102 Ct. Cl. 837 (1944). In this instance, to be sure, a special jurisdictional Act provided that the California Attorney General could present the claims to the Court of Claims. Act of May 18, 1928, ch. 624, 45 Stat. 602, 25 U.S.C. sec 654. But this appears to be no more than acquiescence in a decision taken at the State level that California would attempt to vindicate the aboriginal claim of all Indians within the State. *See* Cal. Stats. 1927, ch. 643, p. 1092.

because the Federal Government was not a party. Moreover, the notion enunciated in *Massachusetts v. Mellon* is not of constitutional dimension, *Maryland People's Counsel v. F.E.R.C.*, 760 F.2d 318, 321 (D.C.Cir. 1985), and is by no means absolute. "We need not go so far as to say that a state may never intervene by suit to protect its citizens" against the Federal Government. *Mellon*, 262 U.S. at 485; *see Massachusetts v. Baird*, 400 U.S. 886 (1970) (Douglas, J., dissenting). Thus California was permitted to bring suit to vindicate the aboriginal rights of native Californians in *Indians of California v. United States*, 98 Ct.Cl. 583 (1942), *cert. denied*, 319 U.S. 764 (1943); *Indians of California*, 102 Ct.Cl. 837 (1944). In those cases Congress, it is true, assented to a determination by California, through its Attorney General Earl Warren, to sue the United States as *parens patriae* on behalf of the natives. But the assent of Congress does not appear essential. Here, in any event, we have Congress's waiver of sovereign immunity in the Quiet Title Act, among the other statutes pursuant to which this case was brought. And in the Guam Organic Act Congress manifests its intent that the new government of Guam act as the conservator of the new land patrimony of the Territory. Section 28(b) requires that the lands transferred to Guam under the section (none were, of course) "be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable." No charge is more fundamental to the role of one responsible for administering land for another as the charge of defending and perfecting the title to that land. Here the Guam Legislature, acting pursuant to the role given it by Congress in Section 28(b), authorized this litigation.[4] *See* Northwest Territory of Guam Act of May 30, 1995 Guam Pub. L. No. 23-24.

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[4] In any event, the better view is that while *Mellon* may prohibit a State from bringing a *parens patriae* action to declare a federal statute unconstitutional, it does not apply when, as here, the State is suing "to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement. That federal agency is not the only public body that may invoke judicial assistance . . . ." *Washington Utilities & Transp. Com'n v. F.C.C.*, 513 F.2d 1142, 1153 (9th Cir. 1975).

4. The potential relevance of *Rice v. Cayetano* is not so easily dismissed as the Government would have it. Throughout this case the Government has emphatically denied the applicability to the native people of Guam of the canon requiring, when possible, the construction in their favor of a statute affecting the rights of native people. The Government's denial has been all along grounded on the assertion that the native Guamanians have never been in a trust relationship with the United States. *See* No. 97-17140, C.A. 9, *Brief for Federal Appellees* at 27-28. In the district court, counsel for the United States had added that native Guamanians should be viewed in the same light as native Hawaiians, with whom, it was said, no such special relationship exists. *See Defendants' Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment and in Further Support of Defendants' Motion for Summary Judgment* at 11-12.

Today the United States has wholly changed position. In its eloquent *Brief for the United States as Amicus Curiae*, filed in No. 98-818, *Rice v. Cayetano*, the Solicitor General emphatically maintains that there does exist a special fiduciary relationship between the United States and native Hawaiians. Presumably, he takes the same view with respect to native Guamanians.

If so, then he presumably also agrees that the canon of construction so forcefully articulated by Justice Holmes in *Cariño* and in scores of other cases (*see* Pet. 15, n.16) applies equally to the native people of Guam as to the native people of the Lower 48 States, Alaska and, now, Hawaii. It would remain only to dispel the fiction that the Guam Organic Act's Section 28 is so plain in its meaning as not to require construction. As we state succinctly in point 2 above, we think we have done this. *See* Pet. 15-19.

CONCLUSION

When Congress enacted Guam's Organic Act, 90 percent of the island's population was native Chamorro according to the most recent census figures. *See* Census of Population: 1950, Vol. II, Part 54, Table 36 (1953). America's purpose in acquiring the Philippines and, presumably, Guam too, "was to administer property and rights 'for the benefit of the inhabitants thereof.'" *Tee-Hit-Ton Indians v. United States*, 348 U.S. at 284-85 n.18 (1955) (quoting 32 Stat. 695).

In *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937), Justice Cardoza wrote for the Court, "The loyalty of the Shoshone tribe to the

people of the United States has been conspicuous and unfaltering. A fidelity at least as constant and inflexible was owing in return." Months before passage of the Guam Organic Act, a House committee considering the bill proclaimed in plain awe, "There are no more patriotic, loyal people under the American flag than the Guamanians . . . . Throughout the Japanese occupation Guamanians demonstrated their great loyalty and devotion to this country."[5] We submit a fidelity at least as constant is owed the Guamanians. The petition should be granted.

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[5]H.R. Report No. 1677, 81st Cong., 2d Sess (1950), p. 4, reprinted in No. 97-17140, C.A. 9, *Brief for the Federal Appellees*, A-1 at A-4.

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